COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2020-P-0865

SUBURBAN HOME HEALTH CARE INC.
Plaintiff-Appellant

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES, OFFICE OF MEDICAID
Defendant-Appellee

On Appeal from Judgment and Order of the Superior Court, Suffolk County, C.A. No. 1984CV03125-BLS2

BRIEF OF APPELLANT SUBURBAN HOME HEALTH CARE, INC.

Brian T. Kelly(BBO# 549566)
Joshua C. Sharp (BBO# 681439)
Lauren A. Maynard (BBO# 698742)
Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109
Tel: (617) 345-1000
Fax: (617) 345-1300
bkelly@nixonpeabody.com
jsharp@nixonpeabody.com
lmaynard@nixonpeabody.com

James J. Marra (BBO# 561739)
General Counsel
Suburban Home Health Care, Inc.
1050 Commonwealth Avenue, Suite 300
Boston, MA 02215
(617) 264-7100
jmarra@shhcsg.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Plaintiff-Appellant Suburban Home Health Care, Inc., by and through undersigned counsel, states that it has no parent corporation and there are no publicly held corporations that own 10% or more of the company's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Massachusetts Cases

Federal Cases

Statutes

Regulations

STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in finding that no statute of limitations barred MassHealth's administrative action under G.L. c. 118E to recoup alleged overpayments made to SHHC nearly 11 years prior to issuing its Initial Notice of Determination of Overpayment and 14 years prior to issuing its Final Notice of Determination of Overpayment.
2. Whether the Superior Court erred in finding that MassHealth's administrative action to recoup alleged overpayments was not barred by the doctrine of laches where MassHealth did not issue its Initial Notice of Determination of Overpayment until nearly 11 years after the alleged overpayments were made and did not issue its Final Notice of Determination of Overpayment until 14 years after the alleged overpayments were made.

STATEMENT OF THE CASE

Suburban Home Health Care, Inc. ("SHHC") brought this action for a declaratory judgment that MassHealth's attempt to recoup alleged overpayments made to SHHC in 2005 is barred by the statute of

limitations. (R.A. 6).[1] On January 7, 2020, MassHealth moved to dismiss the complaint, arguing that SHHC had not exhausted its administrative remedies, and that it was in compliance with any applicable statute of limitations. The Superior Court heard oral argument on the motion on February 6, 2020, and on April 15, 2020, granted MassHealth's Motion to Dismiss. (R.A. 59, 114). The Superior Court held that the matter was properly before it because the civil action "present[ed] a purely legal question of wide public significance," but that the action should be dismissed because no statute of limitations applies to administrative proceedings. (R.A. 117-18). The Court also found that MassHealth's recoupment was not barred by laches because the "defense of laches cannot be asserted against a government agency seeking to enforce Massachusetts law or protect the public interest." (R.A. 119).

On April 27, 2020, SHHC moved for reconsideration, arguing that the Superior Court erred by summarily holding that statutes of limitation never apply to administrative proceedings. The Court denied

[1] Citations to the joint Record Appendix ("R.A.") are designated as follows: R.A. [page #].

SHHC's motion on June 18, 2020, finding that *Zora* – the case SHHC relied upon - had not been presented in SHHC's initial briefing, and that it was nonetheless inapplicable. (R.A. 124-25).

STATEMENT OF THE FACTS

Appellant SHHC provides in-home health services for Medicare and Medicaid patients. Appellee Executive Office of Health and Human Services Office of Medicaid ("MassHealth") administers the Medicaid program for the Commonwealth of Massachusetts. In order to participate in the MassHealth program, healthcare providers like SHHC must apply for and be approved as MassHealth providers and enter into a contractual agreement with MassHealth. G.L. c. 118E, § 38; 130 CMR 450.222-223.

SHHC executed a Provider Agreement with MassHealth on September 8, 1994 (the "Provider Agreement"). (R.A. 23-24). Under the terms of the Provider Agreement, SHHC "provide[s] services to eligible [Medicaid] recipients," and MassHealth reimburses SHHC at established rates "for all reimbursable services and goods actually and properly delivered to eligible recipients and properly billed to [MassHealth]." (R.A. 8, 23). According to the

governing statute, if MassHealth determines that it has overpaid a provider, that amount may be recovered after following the processes outlined in the statute. *See* G.L. c. 118E, § 38.

On December 2, 2005, MassHealth sent SHHC a letter stating that it would be conducting a "retrospective utilization review and peer review of services rendered by providers to MassHealth members." (R.A. 26). Thereafter, on December 27, 2005, MassPRO – a third party vendor – informed SHHC that it had contracted with MassHealth to "conduct routine retrospective reviews of providers[.]" (R.A. 29). MassPRO requested documents for services provided from June 1, 2005 through August 30, 2005. *Id.* In February 2006, SHHC received a letter from MassPRO stating that under its standard retrospective case review process, "[MassPRO] must complete the review and render the initial determination within 30 days," and that if MassPRO "identifies a concern, the provider has 20 days to respond." (R.A. 34). SHHC complied with MassPRO's requests and submitted its records in early 2006. (R.A. 10).

The parties dispute whether MassPRO visited SHHC in early 2006 to hold a close-out meeting during which

MassPRO informed SHHC that its audit had revealed no issues. (R.A. 10-11).[2] Nevertheless, the uncontested fact remains that SHHC did not receive a determination within 30 days of sending its medical records to MassPRO. In fact, SHHC did not receive **any** correspondence from MassPRO or MassHealth regarding the audit for over ten years - from early 2006 until late 2016. (R.A. 11).

Then, on November 8, 2016 – nearly 11 years after receiving the audit notification – MassHealth sent SHHC an "Initial Notice of Determination of Overpayment" (the "Initial Notice"), alleging that approximately $95,000 in overpayments had been made to SHHC during the audited time period of June to August 2005. (R.A. 36-37). The Initial Notice stated that SHHC had thirty days to submit its response to MAXIMUS, the company which had replaced MassPRO as MassHealth's third-party auditor. *Id.*

Although SHHC believed the Initial Notice was untimely, it contested MassHealth's findings in order to preserve all rights of appeal. SHHC submitted its

[2] At the motion to dismiss stage, all facts must be construed in favor of the non-moving party. *See Rafferty v. Merck & Co.*, Inc., 479 Mass. 141, 147 (2018).

response to MAXIMUS on December 6, 2016. (R.A. 40). On December 7, 2016, MassHealth held an informal conference with SHHC. (R.A. 12). Approximately 90 days after the conference, having heard nothing from MassHealth or MAXIMUS, SHHC inquired with MassHealth and was told that MAXIMUS was "in the final stages of completing their review." *Id.* SHHC did not receive any further correspondence from MassHealth regarding the alleged overpayments for over two years. *Id.* Then, on September 9, 2019 (14 years after the alleged overpayments were made), MassHealth issued a "Final Notice of Determination of Overpayment," which reduced the amount of the alleged overpayment to approximately $75,000. (R.A. 56-57).

Out of an abundance of caution and to preserve its substantive challenge to the finding of overpayment, SHHC filed for an adjudicatory hearing before the MassHealth Board of Hearings on October 7, 2019 (R.A. 15) – which to this day has still not occurred. On the same day, SHHC filed this action in Superior Court to stop MassHealth's untimely attempt to recoup the alleged overpayments. (R.A. 6-21).

SUMMARY OF THE ARGUMENT

The Superior Court erred in granting MassHealth's motion to dismiss and declining to issue a declaratory judgment barring MassHealth from taking any adjudicatory action on the claims it paid to SHHC in 2005. The decision below was incorrect for two reasons. First, MassHealth's administrative action for recoupment brought pursuant to G.L. c. 118E for payments made to SHHC nearly 11 years prior to issuing its Initial Notice of Determination of Overpayment is barred by the statute of limitations. Second, MassHealth's attempt to recoup alleged overpayments from 2005 is barred by the doctrine of laches.

The Superior Court erroneously held that statutes of limitation do not apply to administrative actions, but only to civil actions brought in court. This is not the case. The Supreme Judicial Court ("SJC") has applied limitations periods to administrative actions. In those cases, where the underlying statutory authority did not provide a limitations period, the Court looked to the "nature of the right asserted" to determine which statute of limitations applied. Where the Court found that no limitations period applied, it was because the administrative action was brought

pursuant to a statutory mandate that created an "automatic legal consequence." By contrast, Chapter 118E - the statute giving MassHealth the right to seek recoupment of alleged overpayments - does not create an "automatic legal consequence," but merely provides the mechanism by which MassHealth may seek to recoup overpayments. Thus, like the proceedings at issue in those cases where the SJC recognized a limitations period, MassHealth's administrative action is also subject to a statute of limitations. [*See* Section II. A. at 16].

MassHealth's action to recoup alleged overpayments is subject to the six-year statute of limitations governing contractual claims pursuant to G.L. c. 260, § 2. Since Chapter 118E does not prescribe a limitations period for recoupment actions, the court must look to the "nature of the right asserted" to determine the applicable statute of limitations. Massachusetts courts have consistently recognized that the relationship between MassHealth and providers is contractual. Additionally, MassHealth's administrative action is based on obligations in its Provider Agreement with SHHC. Thus, the "nature of the claim" is an action in

contract subject to the six-year limitations period. [*See* Section II. B. at 24].

MassHealth's action for recoupment is now time-barred, because it did not commence the action within the six-year limitations period. The action for overpayment accrued at the earliest when MassHealth made the alleged overpayments to SHHC in the period from June to August 2005, and at the latest when it was put on notice that alleged overpayments were made and commenced an audit – in December 2005. Thus, MassHealth had until December 2011, at the latest, to commence an adjudicatory action for recoupment. Instead, after nearly eleven years, MassHealth sent SHHC an Initial Notice of Determination of Overpayment in November 2016. The audit did not toll the statute of limitations, and there is no basis for claiming that the audit itself "commenced" the action. Accordingly, MassHealth's attempt to commence an adjudicatory action for recoupment of alleged overpayments made in 2005 is untimely. [*See* Section II. C. at 27].

Finally, even if MassHealth's action were not barred by the statute of limitations, it is barred by principles of equity. MassHealth's delay in bringing

its action against SHHC was "unjustified, unreasonable, and prejudicial," and thus barred by the doctrine of laches. While some courts have declined to apply the doctrine as a bar to claims by government entities, others have recognized exceptions. MassHealth has provided no reasonable explanation for its delay, and its attempt to bring an action now – over a decade after the claims were paid to SHHC – substantially prejudices SHHC's ability to respond. It is inconceivable that a government agency could sit on its rights for decades and bring actions against private entities without limitation. Equity demands that MassHealth's action be time barred. [*See* Section III at 32].

ARGUMENT

I. Standard Of Review

The Superior Court's decision to grant MassHealth's motion to dismiss is subject to *de novo* review. *See Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011) ("We review the allowance of a motion to dismiss de novo."). Because the review is *de novo*, the Appellate Court is not bound by the Superior Court's determinations and owes no deference to the

Superior Court's decisions. *See Fed. Nat. Mortg. Ass'n v. Hendricks*, 463 Mass. 635, 637 (2012).

II. MassHealth's Administrative Action To Recoup Alleged Overpayments Made To SHHC In 2005 Is Barred By The Statute of Limitations

A. Administrative proceedings can be subject to statutes of limitations

In its Order granting MassHealth's motion to dismiss, the Superior Court held that MassHealth's action to recoup the alleged overpayments was not barred by a statute of limitations because "statutes of limitation that govern the bringing of a civil action do not limit the time within which state agencies must begin purely administrative proceedings." (R.A. 119). This overbroad ruling is not the law.

Massachusetts courts have routinely held that where no limitations period is specified in a statute, the "essential nature of the right asserted determines the appropriate statute of limitations." *Micera v. Neworld Bank*, 412 Mass. 728, 731 (1992); *Town of Nantucket v. Beinecke*, 379 Mass. 345, 347-50 (1979) (applying G.L. c. 260 statute of limitations to an action under State conflict of interest law even though the enabling statute did not explicitly

prescribe the limitations period). Thus, it is the "nature of the right asserted" and not the nature of the proceeding that determines which statute of limitations – if any - applies.

The Supreme Judicial Court has applied this analysis to both civil and administrative actions, treating actions brought via administrative proceeding no differently than civil actions brought in court. Regardless of the action's forum, the determinative factor with respect to limitations is the "nature of the right asserted." *See Anawan Ins. Agency, Inc. v. Div. of Ins.*, 459 Mass. 592 (2011) (G.L. c. 260, §5A's four-year statute of limitations applied to administrative actions brought by division of insurance under G.L. c. 175, § 177); *Zora v. State Ethics Comm'n*, 415 Mass. 640 (1993) (applying G.L. c. 260, § 2A's three-year limitations period to administrative action brought by State Ethics Commission under G.L. c. 268A, § 17).

In *Anawan*, the Division of Insurance brought an administrative enforcement action to fine an insurance company for paying an unlicensed individual as an insurance broker. 459 Mass. at 593. The Court held that the "essential nature" of the right asserted

under the enforcement statute "reflect[ed] a legislative intent to protect consumers from unlicensed practitioners." *Id.* at 598. Thus, the Court applied G.L. c. 260, § 5A, the statute of limitations for "[a]ctions arising on account of violations of any law intended for the protection of consumers[.]" *Id.* at 597. The Court did not discuss the fact that the Division's action was an "administrative action" and not a "civil action" brought in court. Instead, it applied the well-settled principle that "[t]he essential nature of the right asserted determines the appropriate statute of limitations" without distinction. *See id.* at 597 (quoting *Micera*, 412 Mass. at 731 and citing *Nantucket*, 379 Mass. at 347-49).

Similarly, in *Zora*, where the State Ethics Commission brought an administrative action against members of a town conservation commission for violating the state's conflict of interest law, the Court applied the statute of limitations applicable to claims for breach of official duty.[3] 415 Mass. 640.

[3] In its order denying SHHC's motion for reconsideration, the Superior Court claimed that it was improper for SHHC to cite *Zora* for the first time in a motion to reconsider. However, neither party addressed the "administrative" versus "civil action" issue in their briefs – the Superior Court raised and

Again, the fact that the action was an "administrative proceeding" and not a "civil action" made no difference. The Court in *Zora*, also citing *Nantucket*, did not discuss that issue; it looked only to the governing statute and the "essential nature of [the] adjudicatory proceedings" brought pursuant to it. *Id.* at 647-48.

The Superior Court's substantial reliance on *State Bd. of Retirement v. Woodward* was misplaced. In that case, the Supreme Judicial Court found that pension forfeiture proceedings under G.L. c. 32, § 15(4) are not subject to any statute of limitations. *See Woodward*, 446 Mass. 698 (2006). *Woodward*'s narrow holding does not stand for the broad proposition that administrative actions are not "actions" subject to statutes of limitation. It merely provided one specific set of circumstances in which the "essential nature of the right asserted" dictated that no limitations period applied. Those circumstances and

---

decided this issue *sua sponte*. It was after the Superior Court raised the issue for the first time that SHHC moved for reconsideration. For the reasons explained in this section, the Superior Court erred in holding that administrative proceedings are not subject to statutes of limitation.

the facts underpinning the Court's decision are wholly distinguishable from the present case.

In *Woodward*, a retired state legislator was convicted in federal court on counts of mail fraud, wire fraud, and bribery. *Id.* at 699. Over six years after his conviction, the State Board of Retirement notified Woodward that it had received information that could result in the forfeiture of his pension pursuant to G.L. c. 32, § 15(4). *Id.* at 700. Woodward argued that the Board's action was time barred by the six-year statute of limitations applicable to contracts. The Court disagreed, finding that the statute of limitations did not apply because the Board's action under Chapter 32 was not an "action in contract," but a "ministerial step to effectuate formally what already has occurred by operation of law." *Id.* at 705.

In reaching its decision, the *Woodward* Court focused largely on the "mandatory" nature of the pension forfeiture statute:

> Section 15 (4) states: "*In no event* shall any member after final conviction ... be entitled to receive a retirement allowance .... The words "[i]n no event" connote the absolute never or "under no circumstances." ... § 15(4) "does not allow the board any discretion as to the revocation of pension benefits."

Id. at 708 (citations omitted) (emphasis in original). The Court reasoned that because "pension forfeiture . . . is an **automatic legal consequence** of conviction of certain offenses," it would be "illogical to permit the board to accomplish by inattention or inaction what it is prohibited from doing as a matter of discretion." *Id.* (emphasis added). Thus, the Court concluded that "'in no event' is a clear expression of the Legislature's intent that pension forfeiture under § 15(4) is not subject to any period of limitations." *Id.*

In the present case, the Superior Court found that G.L. c. 118E, §§ 12, 38, which provides that MassHealth may withhold payments from or seek recoupment of overpayments made to providers, creates an "absolute statutory right" for MassHealth to commence an administrative action at any point in time. (R.A. 125). But the Superior Court failed to recognize the distinction between a right and a mandate. Unlike the statute at issue in *Woodward*, Chapter 118E does not create an "automatic legal consequence" with no statute of limitations

requirement.[4] Chapter 118E merely provides the mechanism for MassHealth to seek recoupment of overpayments. Specifically, Section 38 outlines the adjudicative process that must be followed in order for MassHealth to recoup overpayments, and Section 12 provides that "the division **may** withhold provider payments to ensure sufficient funds will be available to satisfy any amounts that may become due from a provider," (emphasis added). The Legislature's use of the word "may" connotes an entirely different intent than that expressed by the phrase "in no event," as the statute in the *Woodward* case read. The permissive nature of the language used in Section 12 affords MassHealth a degree of discretion that the pension board in *Woodward* did not have.

Moreover, the statute at issue in *Woodward* merely created a necessary consequence of a criminal conviction. The administrative hearing before the ethics board was meant to provide the defendant with formal due process rights, not to re-adjudicate or

[4] Since neither Section 12 nor Section 38 specifically addresses when MassHealth must commence its action to recover alleged overpayments against a provider, it is the "essential nature of the [MassHealth] action" that determines the appropriate statute of limitations for this matter.

evaluate the facts underlying the conviction. Thus, many of the concerns that statutes of limitation are designed to address were not present. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitation "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence"). In *Woodward*, there was no concern about the respondent being able to defend himself from the underlying claims by presenting records which may have been discarded, or witnesses who may no longer be available; those issues had already been litigated as part of a criminal proceeding, itself subject to a statute of limitations. By contrast, the statutes at issue in *Anawan* and *Zora*, like the one here, imposed liability for violations which would be adjudicated in the first instance through the administrative proceedings. In such proceedings, it is vital that "the search for truth" is not "seriously impaired . . . by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117.

Finally, the *Woodward* Court found it important that § 25(5) had been construed as "creating something

less than a full contractual relationship," such that the Board could "implement administratively the preexisting pension forfeiture provisions of § 15(4) without an action in contract." *Id.* at 705-06. That is not the case here. As discussed below, the relationship between MassHealth and providers is nothing but contractual.

Accordingly, since Chapter 118E has no specific limitations period contained in it, does not create an "automatic legal consequence" or legal mandate by the legislature that it is not subject to any period of limitation, and is in fact based on a contractual relationship between the parties, adjudicatory proceedings against a provider arising from this statute are subject to the Commonwealth's six-year statute of limitations (G.L. c. 260, § 2).

B. The six-year statute of limitations applicable to contract disputes applies to MassHealth's recoupment action

The parties do not dispute, and the Superior Court agreed, that to the extent a statute of limitations would apply, it would be the six-year limitations period applicable to contractual claims in court proceedings. *See* R.A. 119 ("If MassHealth were to commence **a court proceeding** in an attempt to

collect against Suburban, that would be subject to the six-year statutory limitations period." (emphasis added)).

Chapter 118E does not explicitly provide a statute of limitations for when MassHealth must commence an administrative action to recover alleged overpayments from a provider.[5] Accordingly, following the Supreme Judicial Court rulings in *Nantucket*, *Zora*, *and Anawan*, the Court must look to the "nature of the right asserted" by MassHealth to determine the applicable statute of limitations. The relationship between SHHC and MassHealth is contractual. SHHC provides services to MassHealth patients, submits its claims to MassHealth for reimbursement, and receives payment from MassHealth for services provided pursuant to the terms of the Provider Agreement. Massachusetts courts have consistently recognized the contractual nature of this relationship, and have treated claims for recoupment as breach of contract claims. *See In re Fredette*, 42 B.R. 954, 958 (Bankr. Mass. 1984)

[5] G.L. c. 118E, § 44 does contain a six-year statute of limitations period for a civil action commenced by the Attorney General or a district attorney for alleged violations of the medical assistance (Medicaid) statute.

(treating a Massachusetts Department of Public Welfare (predecessor agency to MassHealth) recoupment action as an action in contract subject to a six-year statute of limitations and noting "[t]he Supreme Judicial Court has recently characterized the relationship between the Department of Public Welfare and a provider of health services entitled to Medicaid funds as a 'contractual relationship[.]'"). *See also Sargeant v. Comm'r of Public Welfare*, 383 Mass. 808, 813 (1981) (relationship between the predecessor to MassHealth and a provider is contractual); *Mass. Gen. Hosp. v. Comm'r of Public Welfare*, 359 Mass. 206, 208 (1971) (provider "in furnishing medical care and services, in effect was a vendor of services which the Boston department 'purchased' under the statute"); *Falmouth Hosp. v. Comm'r of Public Welfare*, 23 Mass. App. Ct. 545, 548 (1987) ("The title 'contractual' can hardly be gainsaid in cases like the present where the provider has rendered services under what amounts to a fees schedule.").

Because the relationship between SHHC and MassHealth is contractual, and MassHealth is seeking to bring an administrative action based on obligations in the Provider Agreement, the "nature of the claim"

is an action in contract and is limited to a six-year limitations period.

C. MassHealth commenced the present action after the six-year limitations period expired

Actions in contract must "be commenced within six years next after the cause of action accrues." G.L. c. 260, § 2. Generally, a cause of action for breach of contract accrues at the time of the breach. *Eastman v. Mass. Motor Transport Ass'n.*, Mass. App. Ct., No. 09-P-1958, 2010 WL 5464834, at *1 (Dec. 30, 2010) (citing *Int'l Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 29 Mass. App. Ct. 215, 221 (1990)). The limitations period "starts to run when an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury," even if a specific amount of damages may not be ascertained until a later time. *Id.* (citing *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 207 (1990)). The statute of limitations may be tolled by active concealment of the breach, or where the cause of action "is not capable of being discovered by the injured party though the exercise of reasonable diligence." *Bovarnick v. Fleet Bank of Mass., N.A.*, Mass. Super., Nos. 023490, 86633, 2004 WL 2915736, at

*4 (Nov. 16, 2004) (citing *Int'l Mobile Corp.*, 29 Mass. App. Ct. at 221-22).

MassHealth made the alleged overpayments to SHHC in the period from June to August 2005. This is the time at which the contract for payment was breached by virtue of receiving payments that were allegedly not payable under the terms of the contract. Thus, the cause of action accrued at that time. But even assuming the action did not accrue until MassHealth was on notice of the potential overpayment, the action accrued at the latest in December 2005 when the payments were identified for audit. According to MassHealth, audits are initiated after an algorithm highlights red flags and experts review the records and identify potential overpayments. (R.A. 65). Thus, MassHealth was "on notice" that it may have suffered an injury due to alleged overpayments to SHHC as of December 2005.

MassHealth does not dispute that it had awareness of a potential overpayment at that time. Instead, MassHealth asserts that the initiation of the audit itself commenced the action, and was thus timely. *See* R.A. 65, 68. The audit notice, however, did not commence the action. It stated only that MassHealth

was conducting "a retrospective utilization review," and cited generally the regulation governing medical necessity and record keeping. The audit notice made no allegations, did not reference potential overpayments, and did not refer to the regulation regarding the determination of overpayments. In short, the audit notice did not notify SHHC of the allegations and claims against it, and thus did not satisfy the statute of limitations. *Cf. Kubrick*, 444 U.S. at 117 (statutes of limitation reflect the "legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time"). Instead, the action was commenced at the earliest on November 8, 2016, when MassHealth sent its Initial Notice setting forth the alleged violations of law and inviting SHHC to respond to any allegations with which it disagreed. *See Anawan*, 459 Mass. at 595 (noting that action was commenced when Division of Insurance sent "show cause" letter); *Zora*, 415 Mass. at 646 (action was commenced "by filing orders to show cause alleging that the plaintiffs had violated [the statute]").

Any argument that the audit period tolls the limitations period is also without merit. There is no

support for this position in Massachusetts case law, the governing statute or regulations, nor in the Provider Agreement. The fact that MassHealth needed to complete the audit to ascertain the exact amount of the alleged overpayment did not stop the clock. *See Eastman*, 2010 WL 5464834, at *1 (the limitations period applies "even though a specific amount of damages is unascertainable at the time of the breach"); *Life Ins. Ass'n of Mass., Inc. v. State Ethics Comm'n*, 431 Mass. 1002 (2000) (statute of limitations tolled until Commission "had **some** reason to know that a **potential** violation" had occurred (emphasis added)); *United States v. Diaz, M.D.*, 740 F.2d 1491, 1493 (11th Cir. 1984) (cause of action to collect overpayments for unnecessary medical services accrued when the government **could reasonably have** known facts material to the right of action – not when it **actually knew all** of the facts – and government could have reasonably known of some material facts prior to the close of investigation). Here, MassHealth commenced its audit into potential overpayments in December 2005, less than approximately five months after the earliest payments at issue were made. MassHealth had over five years to complete its audit

before the six-year statute of limitations ran, and there is no suggestion that SHHC hindered that review in any respect. In sum, there exist no legal grounds for tolling the statute of limitations.

In similar circumstances, the Attorney General's Office ("AGO") conducts investigations prior to formally bringing claims on behalf of the Commonwealth. If, for example, the AGO had brought a false claims action against SHHC based on the alleged overpayments in this case, it would have had to conduct and conclude its initial investigation and commence the action within the prescribed maximum ten-year time period. *See* G.L. c. 12, § 5K. The investigation would not toll the statute of limitations. Recognizing that investigations may last beyond the limitations period, the AGO often enters into tolling agreements with defendants in order to prevent its claims from expiring.

There is no reason why this case should be treated any differently. MassHealth had six years to conduct its audit and commence an administrative action for any alleged overpayments. Instead, it spent nearly eleven years completing its audit, without sending a single correspondence to SHHC. If MassHealth

expected the audit to last beyond the six-year limitations period it should have attempted to obtain a tolling agreement from SHHC, or initiated its administrative action before the end of 2011. It did not, and MassHealth is now time-barred from taking any action to adjudicate the claims that were paid to SHHC in 2005.

III. MassHealth's Attempt To Recoup Payments Made Nearly 11 Years Prior To Its Notice Of Overpayment Is Barred By The Doctrine Of Laches

Even if MassHealth's action is not barred by the statute of limitations, it is barred by principles of equity. Under MassHealth's theory, it could bring an action to recoup payments made decades ago, as long as it initiated an audit within six years. Under the Superior Court's theory, MassHealth could bring such an action without *any* limitation, regardless of whether an audit had ever been initiated. There is absolutely no limiting principle. This makes no sense and cannot be the law.

The common law principles of equity provide "flexible tools to be applied with the focus on fairness and justice." *Miliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 560 (2008) (citations omitted). As an equitable defense, the doctrine of laches promotes

fairness in cases where plaintiff's delay in bringing an action is unjustified, unreasonable, and prejudicial, such that it "works disadvantage to another." *See A.W. Chesterton Co. v. Mass. Insurers Insolvency Fund*, 445 Mass. 502, 517 (2005). Here, MassHealth has not provided any reasonable justification for its delay. While it is expected that audits do take some time to complete, a delay of nearly eleven years to review payments made over a two-month period is beyond the pale. SHHC could not reasonably have expected the audit to continue for so long. SHHC had been informed that MassPRO's review would be complete within 30 days, it believed that MassPRO conducted a "close out" meeting, and it never received any correspondence from MassHealth or MassPRO after early 2006, until receiving the Initial Notice of Overpayment in 2016. Accordingly, after the statutory time period for record retention had expired, and SHHC assumed the 2005 audit had long since been completed based on MassPRO's "MASSHEALTH Letter 2006-1" stating that "MassPRO must complete the review and render the initial determination within 30 days," (R.A. 34), SHHC took the reasonable step of discarding its old records. Now, SHHC is prejudiced by

trying to defend itself in an action brought years after the original records have been discarded or cannot be easily located, witnesses have scattered, and memories have faded. Pursuant to G.L. c. 118E, § 38, MassHealth "shall accord the provider a **reasonable opportunity** to submit additional data and argument to support the provider's claim for reimbursement" (emphasis added). SHHC will not have a "reasonable opportunity" to support the claims it submitted since the physician-ordered nursing services for these patients were rendered over fifteen years ago.

While the doctrine of laches will "generally not serve as a bar where a public right is to be enforced," *see Com. V. Blair*, 60 Mass. App. Ct. 741, 751 (2004), courts have in some cases allowed exceptions to this rule, *see N.L.R.B. v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990) ("[L]aches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties."). Those courts recognized that "[p]rinciples of equitable jurisprudence are not suspended merely because a government agency is plaintiff." *Id.* at 893. *See also Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 878

(1st Cir. 1995) ("Government agencies, like private corporations, have an obligation to conduct their affairs in a **reasonably efficient manner**. An entity that chooses to indulge inefficiencies cannot expect to be granted special dispensations." (citations omitted)(emphasis added)). *Cf. Weiner v. Bd. Of Registration of Psychologists*, 416 Mass. 675, 681 (2006) (reversing decision by Board revoking psychologist's license where Board abused procedures and failed to "secure a just and speedy determination" as required by the standard rules governing practice and procedure, 801 C.M.R. 1.01(2)(b)).[6]

Should this Court refuse to apply the doctrine of laches, equitable considerations still warrant a time bar to MassHealth's delayed recoupment efforts. *Texaco Puerto Rico*, 60 F.3d at 878 ("[E]ven when an equitable defense does not bar the claim, the total balance of equities and hardships might do so." (citations omitted)). MassHealth's failure to bring its claims in a timely manner cannot be excused simply because it is a government agency. MassHealth had **six** years to

[6] The regulations governing MassHealth also state that hearings must be conducted in accordance with 801 CMR 1.01. *See* 130 CMR 450.246.

assert its rights against SHHC. Its delay in waiting **over a decade** to issue an initial notice of overpayment is inexcusable. This is especially so where MassHealth – itself likely overburdened and understaffed – referred the audit work to a third party company which was presumably adept at such tasks. But whether the third-party vendor or MassHealth is technically at fault for the delay does not matter – MassHealth had an obligation to bring its action in a timely manner. Equity demands that MassHealth's action for recoupment be time barred, for "equity ministers to the vigilant, not to those who sleep upon their rights." *Texaco Puerto Rico*, 60 F.3d at 879.

CONCLUSION

MassHealth's attempt to recoup alleged overpayments made nearly fifteen years ago is not lawful and cannot go forward. The administrative proceeding through which MassHealth may seek to recoup overpayments from providers is subject to a statute of limitations. Because MassHealth's claims for overpayment against SHHC are based on a contractual relationship, the six-year limitations period applicable to contract disputes applies in this case.

MassHealth did not bring its action within six years – instead, it engaged in a decade-long audit. MassHealth's untimely attempt to recoup the alleged overpayments is barred by the statute of limitations, and equity demands that such an action cannot proceed. Accordingly, SHHC asks that this Court reverse the Superior Court's decision below and issue a declaratory judgment barring MassHealth from taking any adjudicatory action on the claims that were paid to SHHC in 2005.

Respectfully submitted,

/s/ Brian T. Kelly
Brian T. Kelly (BBO# 549566)
Joshua C. Sharp (BBO# 681439)
Lauren A. Maynard (BBO# 698742)
Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109
Tel: (617) 345-1000
Fax: (617) 345-1300
bkelly@nixonpeabody.com
jsharp@nixonpeabody.com
lmaynard@nixonpeabody.com

James J. Marra (BBO# 561739)
General Counsel
Suburban Home Health Care, Inc.
1050 Commonwealth Avenue, Suite 300
Boston, MA 02215
(617) 264-7100
jmarra@shhcsg.com

Dated: September 28, 2020

ADDENDUM

TABLE OF CONTENTS

Notify

7

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
1984CV03125-BLS2

SUBURBAN HOME HEALTH CARE, INC.

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

MEMORANDUM AND ORDER ALLOWING MOTION TO DISMISS

Suburban Home Health Care, Inc., provides services to clients of the Massachusetts Medicaid program, which is known as "MassHealth." It is suing the Executive Office of Health and Human Services ("EOHHS") to stop MassHealth from recouping certain payments made to Suburban in 2005.

NO for Court 4/15/20 DWS RW SOB MAC

Suburban claims that the six-year statute of limitations governing contract claims bars MassHealth from clawing back the alleged overpayments. In the alternative, it also claims that MassHealth's attempt to offset the alleged overpayments against future amounts it will owe to Suburban without first completing its administrative hearing process violates the state Medicaid statute and constitutional due process requirements.

EOHHS has moved to dismiss this action pursuant to Mass. R. Civ. P. 12(b)(6) on the ground that the complaint does not state any claim upon which relief may be granted. It argues that Suburban has not exhausted its administrative remedies and, in any case, that no statute of limitations bars recovery of the alleged overpayments.

EOHHS's failure-to-exhaust argument is unavailing. Suburban's claims raise pure questions of law. Suburban may therefore assert those claims in court without exhausting possible administrative remedies before MassHealth.

But Suburban's complaint nonetheless fails to state a claim upon which relief may be granted. The contract statute of limitations applies only to civil actions, not to administrative collection procedures. Nor would that statute bar any future civil action to collect amounts owed by Suburban, as such claims will not accrue until the administrative hearing process is complete. And if MassHealth were instead to offset the alleged overpayments against future amounts it owes to Suburban, it could do so before the administrative hearing process is complete without violating statutory or constitutional due process requirements. The Court will therefore ALLOW the motion to dismiss.

1. **Rule 12(b)(6) Standard**. A defense that a civil action may not proceed because the plaintiff has not exhausted potential administrative remedies may be raised by a motion to dismiss under Mass. R. Civ. P. 12(b)(6). See *Daniels* v. *Contributory Retirement Appeal Bd.*, 418 Mass. 721, 722 (1994); *Town of Marion* v. *Massachusetts Housing Finance Agency*, 68 Mass. App. Ct. 208, 210–211 (2007).

To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege facts that, if true, would "plausibly suggest[] … an entitlement to relief" in court. *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

In deciding the motion to dismiss, the Court must assume that the facts alleged by Suburban in its complaint are true and must draw "every reasonable inference" in favor of Suburban from those allegations. *Rafferty* v. *Merck & Co., Inc.*, 479 Mass. 141, 147 (2018); accord *Goodwin* v. *Lee Public Schools*, 475 Mass. 280, 284 (2016) (applying same standard in deciding whether complaint should be dismissed for failure to exhaust administrative remedies); *Town of Hingham* v. *Department of Hous. & Community Dev.*, 451 Mass. 501, 504 n.7 (2008) (same).

Though the Court must assume that the facts alleged in the complaint are true when deciding the motion to dismiss, it need not accept legal conclusions asserted in the complaint, even if they are put "in the form of factual allegations." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 287 (2007), quoting *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000).

2. **Factual Background**. The following facts are alleged by Suburban in its complaint. They do not appear to be disputed by EOHHS.

Suburban provides in-home nursing and rehabilitative therapy services. It has done so for MassHealth clients since at least 1994.

MassHealth began an audit of payments to Suburban in late 2005. It sought documentation for services that Suburban provided from June 1 to August 31, 2005. Suburban submitted the requested records in early 2006.

In November 2016, almost eleven years after beginning its audit, MassHealth issued an "Initial Notice of Determination of Overpayment" stating that, based on its review of the documents provided by Suburban, MassHealth had determined that Suburban was overpaid by roughly $95,000 from June to August 2005.

Suburban submitted a timely written response contesting this finding. This led to an additional review by MassHealth. In September 2019, MassHealth issued

a Final Notice of Determination of Overpayment, reiterating the prior finding of overpayment but reducing the contested amount to roughly $75,000.

Suburban filed this action less then 30 days later, seeking to stop MassHealth from recouping any part of this alleged overpayment. Though not alleged in the complaint, the parties agree that Suburban simultaneously filed a timely claim for an adjudicatory hearing before the MassHealth Board of Hearings pursuant to 130 Code Mass. Regs. § 450.241.

3. **Exhaustion of Remedies**. EOHHS argues that Suburban cannot bring its claims in court because it has not yet exhausted its administrative remedies. The Court disagrees. Suburban's claims raise pure questions of law that do not depend on any factfinding, exercise of discretion, or application of technical expertise by MassHealth or EOHHS. They therefore fall within a well-recognized exception to the exhaustion doctrine. See *Briggs* v. *Commonwealth*, 429 Mass. 241, 249 n.19 (1999) (physician challenging Medicaid reimbursement not required to exhaust administrative remedies where claim turned on pure question of law).

The normal way for Suburban to challenge the Final Notice issued in this case would be through the adjudicatory proceeding now pending before the Board of Hearings. Providers that want to challenge a MassHealth final determination of overpayment must file a claim for an adjudicatory hearing before the MassHealth Board of Hearings. See 130 Code Mass. Regs. § 450.241(D). A provider that disagrees with the hearing officer's ruling may file written objections with the MassHealth director, who will issue a final decision either adopting or modifying the hearing officer's ruling. *Id.* § 450.248. That final decision may then be challenged in Superior Court under G.L. c. 30A, § 14.

"As a general rule, where an administrative procedure is available" from a state agency, as it is in this case, a party must "exhaust the opportunities for an administrative remedy" before seeking declaratory or injunctive relief in court. *Space Bldg. Corp.* v. *Commissioner of Revenue*, 413 Mass. 445, 448 (1992). Even where a party contends that the agency lacks jurisdiction or power to act, the agency "should have an opportunity to ascertain the facts and decide the question for itself...." *Wilczewski* v. *Commissioner of the Dept. of Envtl. Quality Eng'g*, 404 Mass. 787, 793 (1989), quoting *Saint Luke's Hospital* v. *Labor Relations Comm'n*, 320 Mass. 467, 470 (1946).

This exhaustion requirement applies with full force to disputes regarding what amounts MassHealth owes a provider. See *Athol Mem. Hosp.* v. *Commissioner of*

the Division of Medical Assistance, 437 Mass. 417, 427 (2002); *Massachusetts Respiratory Hosp.* v. *Department of Public Welfare*, 414 Mass. 330, 337 (1993).

Nonetheless, in appropriate circumstances a judge has discretion to allow a civil action to proceed before the plaintiff exhausts its administrative remedies. See *Luchini* v. *Commissioner of Revenue*, 436 Mass. 403, 405 (2002); *Space Bldg. Corp.*, 413 Mass. at 448. A judge may make an exception to the exhaustion requirement "when the administrative remedy is inadequate, 'when important novel, or recurrent issues are at stake, when the decision has public significance, or when the case reduces to a question of law.' " *Hingham*, 451 Mass. at 509, quoting *Luchini, supra.* "In addition, the exhaustion requirement may be suspended where 'resort to the administrative remedy would be futile.' " *Green* v. *Zoning Bd. of Appeals of Southborough*, 96 Mass. App. Ct. 126, 129 n.4, rev. denied, 483 Mass. 1106 (2019), quoting *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrim.*, 463 Mass. 472, 480 (2012).

The Court concludes that Suburban need not exhaust administrative remedies before challenging MassHealth's ability to recoup payments it made in 2005 because "the case presents a purely legal question of wide public significance." *Kelleher* v. *Personnel Adm'r of Dep't of Pers. Admin.*, 421 Mass. 382, 385 (1995); accord *Briggs*, 429 Mass. at 249 n.19; *Space Bldg. Corp.*, 413 Mass. at 448–449. Whether MassHealth's recoupment efforts are barred by a statute of limitations, and whether MassHealth may offset the alleged overpayments against future amounts owed before completing its administrative hearing process, reduce to questions of law because the underlying facts are not in dispute. Cf. *Campbell* v. *Schwartz*, 47 Mass. App. Ct. 360, 363 (1999) (dispute as to legal significance of undisputed facts is question of law).[1]

4. **Statute of Limitations Claim.** Suburban is understandably dismayed at being called upon to justify payments it received many years ago. It is troubling that MassHealth waited so long to seek to recoup money paid out in 2005. Though MassHealth identified a potential issue and started an audit process a few months after making the payments, it waited over a decade to issue an initial determination of overpayment. MassHealth then took three more years

[1] EOHHS does contest the allegation that in early 2006 MassHealth's contractor told Suburban it had reviewed the submitted documentation and not identified any concerns. This dispute of fact is immaterial, however. Suburban claims that MassHealth could only seek recoupment within six years after any making any payment. Its statute of limitations claim does not turn on whether there was an affirmative representation of no adverse finding in early 2006.

to evaluate Suburban's response and issue a final determination. All told, over 14 years passed between the last of the contested payments to Suburban and MassHealth's final determination of the amount it now seeks to recoup.

Nonetheless, Suburban's claim that MassHealth's administrative demand for repayment is time-barred fails as a matter of law.

In Count I of its complaint, Suburban contends that (i) it has a contractual relationship with MassHealth, and therefore any attempt by MassHealth to recoup alleged overpayments is a contract claim subject to the six-year statutory limitations period established in G.L. c 260, § 2, (ii) MassHealth's overpayment claims accrued in 2005 when it paid the contested amounts to Suburban, and (iii) those claims are therefore time barred.

This statute of limitations claim is unavailing. The first part of this syllogism is incorrect with respect to MassHealth's efforts to recoup the alleged overpayment through administrative means; those administrative procedures are not subject to the statute of limitations. The second part is incorrect with respect to any future court action by MassHealth to collect from Suburban; such a claim has not yet accrued. This claim therefore fails as a matter of law.

4.1. **Administrative Hearing Process.** No statute of limitations governs MassHealth's internal process for identifying and recovering overpayments to health care providers, though MassHealth concedes that it must begin any audit of payments within six years.[2] The statute of limitations invoked by Suburban applies only to the commencement of "actions of contract" in court, not to administrative proceedings. See G.L. c. 260, § 2.[3]

"As used in statutes of limitation, the word 'action' has been consistently construed to pertain to court proceedings" and not to other adjudicatory or quasi-adjudicatory proceedings. See *Shafnacker* v. *Raymond James & Assocs., Inc.*, 425 Mass. 724, 729–730 (1997) (dismissal of arbitration claim is not dismissal of

---

[2] MassHealth concedes that it must start any such audit process within six years of paying a vendor because the record retention regulation requires providers like Suburban to keep records for "six years after the date of medical services for which claims are made," and to keep "any records while any review, audit, or administrative or judicial action involving such records is pending." See 130 Code Mass. Regs. § 450.205(G).

[3] The Commonwealth has consented to be bound by the Massachusetts statutes of limitation. See G.L. c. 260, § 18 ("The limitations of this chapter, and of section thirty-two so far as applicable to personal actions, shall apply to actions brought by or for the commonwealth.").

an "action" that would trigger savings provision in G.L. c. 260, § 32), quoting *Carpenter* v. *Pomerantz*, 36 Mass. App. Ct. 627, 631 (1994) (arbitration proceedings are not "actions" subject to limitations period in G.L. c. 260, § 2).

As a result, statutes of limitation that govern the bringing of a civil action do not limit the time within which state agencies must begin purely administrative proceedings. See *State Bd. of Retirement* v. *Woodward*, 446 Mass. 698, 705 (2006) (board's implementation of automatic public pension forfeiture under G.L. c. 32, § 15(4) "is not an 'action in contract' subject to the six-year contract statute of limitations" under G.L. c. 260, § 2).

Nor can MassHealth's enforcement action be deemed too late on equitable grounds. "The doctrine of laches operates in equity as an affirmative defense against a plaintiff whose unreasonable delay in bringing a claim results in some injury or prejudice to the defendant." *West Broadway Task Force* v. *Boston Hous. Auth.*, 414 Mass. 394, 400 (1993). But the defense of laches cannot be asserted against a government agency seeking to enforce Massachusetts law or protect the public interest. See *Board of Health of Holbrook* v. *Nelson*, 351 Mass. 17, 19 (1966); *Town of Lincoln* v. *Giles*, 317 Mass. 185, 187 (1944); *Commonwealth* v. *Blair*, 60 Mass. App. Ct. 741, 751 (2004) (enforcement action by Commonwealth).[4]

4.2. **Future Collection Action**. If MassHealth were to commence a court proceeding in an attempt to collect against Suburban, that would be subject to the six-year statutory limitations period. But since such a claim has not yet accrued, such a potential action is not yet time barred.

MassHealth has two distinct ways to recover overpayments from a provider. It may recoup such overpayments by offsetting them against future payments for services to MassHealth clients, without ever going to court. See G.L. c. 118E, § 12. If for some reason MassHealth cannot recoup an overpayment that way, it may opt instead to bring a collection action in court. See G.L. c. 118E, § 38.

---

[4] Though the complaint does not include an express claim for laches, the facts alleged in the complaint would nonetheless state such a claim if it could be pursued against a state agency. A complaint need not "state the correct substantive theory of the case." *Jenson* v. *Daniels*, 57 Mass. App. Ct. 811, 815 n.11 (2003), quoting *Gallant* v. *City of Worcester*, 383 Mass. 707, 709 (1981). A complaint will survive a Rule 12(b)(6) motion to dismiss so long as it alleges facts plausibly suggesting "relief on *any* theory of law," even if the complaint invokes the wrong cause of action. *Gallant*, 383 Mass. at 710, quoting *Whitinsville Plaza, Inc.* v. *Kotseas*, 378 Mass. 85, 89 (1979) (emphasis in original).

The six-year statute of limitations would apply to any such collection action in court. Actions brought to recoup money paid under conditions "giving rise to an obligation in equity and good conscience to refund" the payment are quasi-contractual claims that are subject to a six year limitations period under G.L. c. 260, § 2. *City of New Bedford* v. *Lloyd Inv. Associates, Inc.*, 363 Mass. 112, 118-119 (1973); accord *Suffolk Const. Co.* v. *Benchmark Mechanical Sys., Inc.*, 475 Mass. 150, 156 (2016); *Kagan* v. *Levenson*, 334 Mass. 100, 103 (1956). And actions brought pursuant to a statute are governed by the statute of limitations that govern analogous common law claims. See *Town of Nantucket*, v. *Beinecke*, 379 Mass. 345, 347–349 (1979).[5]

But by statute MassHealth may not start any such collection action in court until after MassHealth's determination of overpayment, "or an administrative review thereof, has become final." G.L. c. 118E, § 38, 5th para.

As a result, no such collection action will accrue—and the six-year statutory limitations period will not begin to run—until the pending administrative hearing process is complete. In this respect collection actions brought against providers under the Massachusetts Medicaid statute are like similar actions under the federal Medicare statute. See *United States* v. *Hughes House Nursing Home, Inc.*, 710 F.2d 891 (1st Cir. 1983); *United States* v. *Gravette Manor Homes, Inc.*, 642 F.2d 231, 234–235 (8th Cir. 1981).

5. **Interim Recoupment Claims**. In Counts II through IV of its complaint, Suburban alleges that MassHealth is trying to offset the alleged 2005 overpayments against current sums owed to Suburban without first completing the adjudicatory hearing process to resolve whether Suburban was in fact overpaid and owes money to MassHealth. Suburban claims that in so doing MassHealth is violating both G.L. c. 118E, § 38, and the due process requirements of the Massachusetts Declaration of Rights.

Though Suburban asserts these additional claims in its complaint, it makes no attempt to defend them in opposing MassHealth's motion to dismiss. By not addressing these three counts, Suburban implicitly concedes that if count I is

---

[5] The exception in G.L. c. 260, § 2, for "actions upon judgments or decrees of courts or record" of the United States or any individual State would not apply here because MassHealth and its Board of Hearings are not courts of record. Cf. *Mead* v. *Bowker*, 168 Mass. 234 (1897) (justices of the peace are not courts of record, even if they act as trial judges and keep record of their proceedings, and thus suit on judgment of justice of the peace acting as trial justice is subject to six-year statute of limitations).

dismissed then the remaining claims should also be dismissed. It therefore appears that Suburban waived any argument that counts II, III, and IV assert valid claims. See *NES Rentals* v. *Maine Drilling & Blasting, Inc.*, 465 Mass. 856, 860 n.8 (2013) (arguments not raised in opposing motion to dismiss are waived); *Roby* v. *Superintendent, Mass. Corr. Inst., Concord*, 94 Mass. App. Ct. 410, 412 (2018), rev. denied, 483 Mass. 1102 (2019) (same).

If Suburban has not waived any argument that the last three counts assert legally viable claims, the Court would nonetheless allow EOHHS's motion to dismiss as to counts II through IV. Cf. *Department of Revenue* v. *Estate of Shea*, 71 Mass. App. Ct. 696, 702, rev. denied, 451 Mass. 1109 (2008) (explaining how Appeals Court would have ruled if appellant had not waived issues by failing to raise them below). Since EOHHS seeks to dismiss these claims and "important policy interests are implicated," it is appropriate for the Court to "raise and resolve the issue[s] sua sponte" to ensure that it does not dismiss meritorious claims. Cf. *Long* v. *Wickett*, 50 Mass. App. Ct. 380, 385 n.6 (2000); accord *Quincy Trust Co.* v. *Taylor*, 317 Mass. 195, 198 (1944) ("Where a court has once taken jurisdiction and has become responsible to the public for the exercise of its judicial power so as to do justice, it is sometimes the right and even the duty of the court to act in some particular sua sponte.").

5.1. **Statutory Authority**. The claim that MassHealth is violating the Medicaid statute by seeking an offset before completing its hearing process has no merit.

Offsetting overpayments before a final decision regarding a provider's administrative challenge is expressly authorized by statute. MassHealth may "withhold provider payments to ensure sufficient funds will be available to satisfy any amounts that may become due from a provider, upon notification to the provider of the amount subject to withholding and the reasons therefore[.]" G.L. c. 118E, § 12. Suburban does not claim that any federal law bars this practice. Contrast *Atlanticare Med. Ctr.* v. *Commissioner of the Div. of Med. Assistance*, 439 Mass. 1 (2003) (MassHealth regulation allowing recoupment from provider where third-party is liable held unenforceable because inconsistent with federal law).

The express authorization in § 12 to "withhold provider payments" is consistent with the provisions in § 38 that govern what happens when a provider challenges a final determination of overpayment. Section 38 provides that an overpayment "shall be recoverable under the provisions of this section unless a provider files a timely claim for an adjudicatory hearing." See G.L. c. 118E, § 38, 4th para. The only recovery mechanism established in § 38 is the

right of MassHealth to file a "certificate" in court as to the overpayment amount owed to MassHealth and to enforce the certificate in the same manner as it could enforce a judgment entered in a civil action. See *id.*, 5th para. The power to recoup overpayments by offsetting them against future amounts owed to a provider is established by § 12, not by § 38.

Thus, under § 38, the only enforcement power that is automatically stayed by filing a claim with the MassHealth Board of Hearings is the power to file and enforce in court a "certificate" as to the final amount owed. By statute, MassHealth's distinct power to offset overpayments is not automatically stayed and therefore may proceed even while the provider is challenging the final determination of overpayment in the administrative hearing process.

5.2. **Procedural Due Process**. Nor would it violate due process for MassHealth to offset the alleged overpayments before completing the administrative hearing process.

Where MassHealth has reason to believe that it overpaid a Medicaid provider, it may recoup the alleged overpayments on an interim basis by offsetting them against sums owed for later years, without waiting to complete an adjudicatory proceeding to litigate whether the overpayments had in fact occurred. See *Haverhill Manor, Inc.* v. *Commissioner of Welfare*, 368 Mass. 15, 25–26 (1975).

If Suburban prevails, it will be able to get back any amount improperly withheld by MassHealth. In these circumstances, such a post-deprivation remedy satisfies the constitutional requirements of procedural due process. *Id.* at 28; accord *Kechijian* v. *Califano*, 621 F.2d 1, 5 (1st Cir. 1980) (hearing after offset against payments to Medicare provider satisfies due process); see also *Leger* v. *Commissioner of Revenue*, 421 Mass. 168, 171–173 (1995) (hearing after collecting assessed taxes satisfies due process).

ORDER

Defendant's motion to dismiss is ALLOWED. Final judgment shall enter dismissing Plaintiffs' complaint with prejudice.

Kenneth W. Salinger
Justice of the Superior Court

23 March 2020

8

JUDGMENT ON MOTION TO DISMISS

Trial Court of Massachusetts
The Superior Court

Michael Joseph Donovan, Clerk of Court

DOCKET NUMBER
1984CV03125

NOTIFY

CASE NAME
Suburban Home Health Care Inc
vs.
Executive Office of Health and Human Services Office of Medicaid

COURT NAME & ADDRESS
Suffolk County Superior Court - Civil
Suffolk County Courthouse, 12th Floor
Three Pemberton Square
Boston, MA 02108

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
Executive Office of Health and Human Services Office of Medicaid

No Objection 4/13/20 PWS PW SCB MAC

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Suburban Home Health Care Inc

This action came on before the Court, Hon. Kenneth W Salinger, presiding, and upon review of the motion to dismiss pursuant to Mass. R.Civ.P. 12(b),

It is **ORDERED AND ADJUDGED:**

For the reasons set forth in the Court's Memorandum and Order Allowing Motion to Dismiss, dated March 23, 2020, the Defendant's motion to dismiss is ALLOWED. Final judgment shall, and hereby does, enter in favor of the Defendant, and the Plaintiff's Complaint is DISMISSED, with prejudice

JUDGMENT ENTERED ON DOCKET 4/15 2020
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SEND TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
04/01/2020	X Lee Kennedy

Date/Time Printed: 04-01-2020 12:07:55

SCV083\ 03/2016

NOTIFY

6/17

10

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
1984CV03125-BLS2

SUBURBAN HOME HEALTH CARE, INC.

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

MEMORANDUM AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Suburban Home Health Care, Inc., is suing the Executive Office of Health and Human Services ("EOHHS") to stop the Massachusetts Medicaid program ("MassHealth") from recouping certain payments made to Suburban in 2005.

The Court dismissed this action several months ago, ruling in part that the six-year statute of limitations for contract claims does not apply to MassHealth's internal administrative collection procedures. Final judgment dismissing this action with prejudice entered on April 15, 2020.

Notice Sent 06.18.20 PWS VDLyp

Suburban served a motion for reconsideration twelve days later. Suburban argues that the Court erred by not considering *Zora* v. *State Ethics Commission*, 415 Mass. 640 (1993), which Suburban contends "is directly on point."

RW VDLyp MAC SCB MRS

The Court did not discuss *Zora* in its prior ruling because Suburban did not rely upon it until now. It is rather late for Suburban to be making this point. "A motion for reconsideration is not the 'appropriate place to raise new arguments inspired by a loss before the motion judge in the first instance.' " *Merchants Ins. Grp.* v. *Spicer*, 88 Mass. App. Ct. 262, 271 (2015), quoting *Commonwealth* v. *Gilday*, 409 Mass. 45, 46 n.3 (1991). If Suburban thought that *Zora* controlled here, it should have made that argument in its opposition to EOHHS's motion to dismiss, and not waited until after final judgment entered to raise it for the first time.

In any case, Suburban's belated reliance on *Zora* is misplaced. That decision does not hold, as Suburban contends, that statutes of limitations always apply to administrative proceedings.

Zora concerned a claim that some public officials had violated the Massachusetts conflict of interest law, G.L. c. 268A. In a prior decision a few years earlier, the Supreme Judicial Court held that a civil action brought by the State Ethics Commission in court to enforce c. 268A is subject to the three-year

statute of limitations established by G.L. c. 260, § 2A, because the "essential nature" of such a claim is that it "sounds in tort." See *Nantucket* v. *Beinecke*, 379 Mass. 345, 348 (1979). In *Zora*, the SJC held that when the Ethics Commission brings an internal adjudicatory proceeding to enforce c. 268A instead of bringing a civil action, *Nantucket* still controls and the same three-year limitations period still applies. See *Zora*, 415 Mass. at 648–649.

This case does not concern c. 268A and is not governed by *Zora*.

Instead, this case concerns MassHealth's absolute statutory right to recoup past overpayments by offsetting them against future amounts owed to a provider, without ever going to court. See G.L. c. 118E, § 12 (MassHealth may "withhold provider payments to ensure sufficient funds will be available to satisfy any amounts that may become due from a provider, upon notification to the provider of the amount subject to withholding and the reasons therefore").

Under this statute, MassHealth does not need to prove that Suburban breached a contract in order to recover past overpayments. If the fact of an overpayment is established, then MassHealth will have an absolute right to recover it.

Where a state agency has a statutory right to recover or avoid certain payments without proving a breach of contract, as under MassHealth's enabling statute, an administrative proceeding commenced to exercise that claimed right "is not an 'action in contract' subject to the six-year contract statute of limitations" under G.L. c. 260, § 2. See *State Bd. of Retirement* v. *Woodward*, 446 Mass. 698, 705 (2006) (administrative board's implementation of public pension forfeiture under G.L. c. 32, § 15(4)).

This case is governed by *Woodward*, not by *Zora*. Suburban's renewed argument that MassHealth's administrative offset proceeding is subject to the six-year statutory limitations period that applies to actions in contract is without merit.

ORDER

Plaintiffs' motion for reconsideration is DENIED.

Kenneth W. Salinger
Justice of the Superior Court

15 June 2020

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 118E. Division of Medical Assistance (Refs & Annos)

M.G.L.A. 118E § 12

§ 12. Policies; procedures; rules and regulations; contracts

Effective: July 1, 2015
Currentness

In administering the medical assistance programs established under this chapter, the division shall formulate such methods, policies, procedures, standards and criteria, except medical standards and criteria, as may be necessary for the proper and efficient operation of those programs in a manner consistent with simplicity of administration and the best interests of recipients.

The division may enter into any types of contracts with providers and manufacturers of medical services, equipment and supplies as the division deems necessary to carry out this chapter including, but not limited to, selective contracts, volume purchase contracts, preferred provider contracts and managed care contracts; provided, however, that those contracts shall be reviewed by the executive office for administration and finance. The division may negotiate the rate of reimbursement to the provider under any such contract and the negotiated rate shall not be subject to sections 13 to 13F, inclusive.

The division may take such further action, consistent with law and within the limits of available funds appropriated for the purposes of this chapter, as may be necessary for carrying out the purposes of this program in conformity with all requirements governing the availability of federal financial participation to the commonwealth under said Title XIX, [1] and Title XXI [2] including said provisions relative to notice and reimbursement, a uniform system of records and accounts to be kept by the regional or local offices and the manner and form of making reports to the division. Without limiting the generality of the foregoing, the division may withhold provider payments to ensure sufficient funds will be available to satisfy any amounts that may become due from a provider, upon notification to the provider of the amount subject to such withholding and the reasons therefor, or where otherwise required or permitted under federal law.

The division may adopt, promulgate, amend and rescind rules and regulations suitable or necessary to carry out the provisions of this chapter and said Title XIX and any amendments thereto, and as interpreted from time to time by the Secretary. Rules and regulations which restrict eligibility or covered services require a public hearing under section 2 of chapter 30A.

Such rules and regulations shall include provisions requiring providers of long term care services intending to withdraw from the medical assistance programs established by this chapter to provide for the continuing care or appropriate relocation of the medical assistance recipients residing in their facilities.

The division may require any long term care provider expressing its intention to withdraw from said programs whose facility is able to meet the standards for participation in said programs to enter into a standard provider contract with the division under which the provider continues to provide services only to those patients residing in its facility at the time the provider announces its intention to withdraw who are eligible for medical assistance or who become eligible for medical assistance during the term of the contract. Such rules and regulations shall also provide that any such provider who has withdrawn from said programs may not participate in said programs for a period of time, not exceeding five years, specified in said regulations.

Such rules and regulations shall also provide that any long term care provider whose facility is unable to meet the standards for participation in said programs shall continue to provide care to the medical assistance recipients residing in its facility until the provider has arranged for the complete relocation of all the medical assistance recipients residing in its facility in accordance with such rules and regulations and with the regulations of the department of public health.

Any provider who violates the provisions of this section by failing to provide care to a medical assistance recipient residing in its facility shall be subject to a fine of one thousand dollars for each violation.

As a method of providing medical assistance to recipients, the division is authorized to contract with any fiscal agent, institution, health insurer, health maintenance organization, health plan, management service or consultant firm consistent with the requirements of 42 CFR Part 434 to administer all or part of the services and benefits available under this chapter; or, to establish a health maintenance organization; provided, that said health maintenance organization shall be operated in accordance with applicable federal and state law.

Notwithstanding any general or special law to the contrary, no health plan offered by, or under a contract with, the division under section 9D or part (a)(26) of 42 USC section 1396d shall constitute the business of insurance and no such plan shall be subject to chapters 175 to 176*O*, inclusive. Nothing in this paragraph shall affect the legal status or obligations under such insurance laws of any entity otherwise constituting or conducting the business of insurance for any other purpose.

Credits

Added by St.1993, c. 161, § 17. Amended by St.1998, c. 161, § 447; St.2003, c. 140, § 29, eff. July 1, 2003; St.2004, c. 65, § 20, eff. April 5, 2004; St.2006, c. 58, § 24, eff. April 12, 2006; St.2012, c. 224, § 118, eff. Nov. 4, 2012; St.2013, c. 35, § 27, eff. Jan. 1, 2014; St.2015, c. 46, § 106, eff. July 1, 2015.

Footnotes

1 42 U.S.C.A. § 1396 et seq.

2 42 U.S.C.A. § 1397 et seq.

M.G.L.A. 118E § 12, MA ST 118E § 12

Current through Chapter 176 of the 2020 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 118E. Division of Medical Assistance (Refs & Annos)

M.G.L.A. 118E § 38

§ 38. Submission of bills by providers; appeals for erroneous denials; overpayments; civil collection actions

Currentness

Providers shall submit to the division a bill for goods sold and services rendered not later than ninety days after the goods are sold or the services rendered, and the division shall verify no less than ten percent of said bills with the recipient of said goods or services. The division shall require that the provider maintain proof, subject to audit, of the actual delivery to recipients of services and goods for which bills are submitted. The division shall verify the accuracy of bills submitted under this section through the application of statistical sampling methods.

Said bills shall be signed under the penalties of perjury; provided, however, that an institution, as defined in clause (c) of section eight, may, in lieu of this requirement, agree in writing with the commissioner that its books and records will be available for inspection at all reasonable times by the division with respect to services rendered under the medical assistance programs administered by the division. The division may establish regulations which provide exceptions to the ninety day billing limitation. Said regulations shall not permit payment of such bills submitted more than one year after the last day of the month in which the goods are sold or the services are provided.

The division may also promulgate regulations which establish procedures for providers to appeal erroneous denials by the division of a provider's claim for payment under this chapter. Such procedures may: (1) provide for disposition of such appeal by a board comprised of division personnel with expertise in claims processing; (2) provide for summary disposition of such appeal based on a review of written submissions; and (3) require that such appeals be filed with the division within thirty days, or some other time period specified by the division, after the date that the division notifies the provider of the final denial of the claim for payment. The provider's right to payment under this chapter shall be extinguished if the provider fails to file an appeal within the time prescribed by the division.

When the division has reason to believe that a provider has received payment to which he is not entitled, the division shall notify the provider of the facts on which it bases its belief, identifying the amount believed to have been overpaid and the reasons therefor, and shall accord the provider a reasonable opportunity to submit additional data and argument to support the provider's claim for reimbursement. After consideration and review of any such information submitted by the provider, the division shall make a final determination. Any amount determined to have been overpaid shall be recoverable under the provisions of this section unless the provider files a timely claim for an adjudicatory hearing raising a material dispute of fact or law. In such adjudicatory hearing, the burden shall be on the provider to demonstrate his entitlement to the payments denied by the division. After such hearing, the commissioner shall notify the provider of his decision with reasons therefor. The decision of the commissioner shall be final and is enforceable under this section unless stayed pursuant to a court order; provided, however, that the division has given written notice of the entry and filing provisions of this section to the provider prior to any notification from the division that it has reason to believe that the provider has received a payment to which he is not entitled. Said written notice shall state that the entry and filing provisions of this section are applicable only to those claims for which the division notifies the provider, subsequent to the date of said written notice, that payments are in dispute.

If the division's determination, or an administrative review thereof, has become final and the amount overpaid remains unpaid in full or in part, the commissioner may file with the clerk of the municipal court of the city of Boston, or in the district court in the judicial district where the provider has his principal place of business, a certificate or a copy thereof under official seal, stating: the name and address of the provider, the amount owed to the commonwealth as overpayment and in default, that the time in which administrative or judicial review is permitted has expired without appeal having been taken, or, if a claim has been filed under section fourteen of chapter thirty A, that the division's determination has not been stayed. Upon such filing of a certificate stating said information, such clerk shall assign a civil docket number to such certificate and enter judgment thereon in the civil docket as in a civil action. Such entry shall include the name of the provider identified in the certificate, the amount of such overpayment in default, and the date such certificate is filed. Such certificate shall be enforceable in the same manner and to the same extent as a judgment entered by a court of competent jurisdiction; provided, however, that the rules of court governing procedures in civil cases after the entry of judgment shall not apply to certificates entered as judgments as provided herein. Retroactive rate adjustments made to the rates of institutional providers pursuant to section thirty-two of chapter six A shall not be subject to the filing and entry dispositions of this section.

No physician shall submit a claim for goods or services rendered if said physician is a salaried employee of a hospital and the hospital submits a claim for such goods or services.

Credits

Added by St.1993, c. 161, § 17.

M.G.L.A. 118E § 38, MA ST 118E § 38

Current through Chapter 176 of the 2020 2nd Annual Session

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)

M.G.L.A. 260 § 2

§ 2. Contract actions; actions upon judgments or decrees of courts of record

Currentness

Actions of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgments or decrees of courts of record of the United States or of this or of any other state of the United States, shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues.

Credits
Amended by St.1948, c. 274, § 1.

M.G.L.A. 260 § 2, MA ST 260 § 2
Current through Chapter 176 of the 2020 2nd Annual Session

End of Document

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 450.000: Administrative and Billing Regulations (Refs & Annos)

130 CMR 450.222

450.222: Provider Contract: Application for Contract

Currentness

A person or entity may become a participating provider only by submitting an Application for Provider Contract. If approved by the MassHealth agency, the application will be part of any subsequent provider contract between the applicant and the MassHealth agency. Any omission or misstatement in the application will (without limiting any other penalties or sanctions resulting therefrom) render such contract voidable by the MassHealth agency.

The Massachusetts Administrative Code titles are current through Register No. 1424, dated August 21, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 450.222, 130 MA ADC 450.222

End of Document

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 450.000: Administrative and Billing Regulations (Refs & Annos)

130 CMR 450.223

450.223: Provider Contract: Execution of Contract

Currentness

(A) If the provider applicant has filed a complete and properly executed application and meets all applicable provider eligibility criteria and nothing in the application or any other information in the possession of the MassHealth agency reveals any bar or hindrance to the participation of the provider applicant, the MassHealth agency will prepare and furnish a provider contract. When fully executed by the provider and the MassHealth agency, the contract will take effect as of the date determined by the MassHealth agency.

(B) Each MassHealth provider must notify the MassHealth agency in writing within 14 days of any change in any of the information submitted in the application. Failure to do so constitutes a breach of the provider contract. In no event may a group practice file a claim for services provided by an individual practitioner until the individual practitioner is enrolled and approved by the MassHealth agency as a member of the group. At its discretion, the MassHealth agency may require a provider to recertify, at reasonable intervals, the continued accuracy and completeness of the information contained in the provider's application. Failure to complete such recertification upon request by the MassHealth agency may result in termination of the provider contract

(C) The following provisions are a part of every provider contract whether or not they are included verbatim or specifically incorporated by reference. By executing any such contract, the provider agrees

(1) to comply with all laws, rules, and regulations governing. MassHealth (see M.G.L. c. 118E, § 36);

(2) that the submission of any claim by or on behalf of the provider constitutes a certification (whether or not such certification is reproduced on the claim form) that

(a) the medical services for which payment is claimed were provided in accordance with 130 CMR 450.301;

(b) the medical services for which payment is claimed were actually provided to the person identified as the member at the time and in the manner stated;

(c) the payment claimed does not exceed the maximum amount payable in accordance with the applicable fees and rates or amounts established under a provider contract or regulations applicable to MassHealth payment;

(d) the payment claimed will be accepted as full payment for the medical services for which payment is claimed, except to the extent that the regulations specifically require or permit contribution or supplementation by the member;

(e) the information submitted in, with, or in support of the claim is true, accurate, and complete; and

(f) the medical services were provided in compliance with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975;

(3) to keep for such period as may be required by 130 CMR 450.205 such records as are necessary to disclose fully the extent and medical necessity of services provided to or prescribed for members and on request to provide the MassHealth agency or the Attorney General's Medicaid Fraud Division with such information and any other information regarding payments claimed by the provider for providing services (*see* 42 U.S.C. 1396a(a)(27) and the regulations thereunder);

(4) that the contract may be terminated by the MassHealth agency if the provider fails or ceases to satisfy all applicable criteria for eligibility as a participating provider;

(5) to submit, within 35 days after the date of a request by the Secretary or the MassHealth agency, full and complete information about:

(a) the ownership of any subcontractor with whom the provider has had business transactions totaling more than $25,000 during the 12-month period ending on the date of the request;

(b) any significant business transactions between the provider and any wholly owned supplier, or between the provider and any subcontractor, during the five-year period ending on the date of the request; and

(c) any information necessary to update fully and accurately any information that the provider has previously delivered to the MassHealth agency or to the Massachusetts Department of Public Health;

(6) that the MassHealth agency may recoup any sums payable by reason of a retroactive rate increase for any period during which the provider owned or operated part or all of a facility against any sums due the MassHealth agency by reason of a retroactive rate decrease for any periods;

(7) to comply with all federal requirements for employee education about false claims laws under 42 U.S.C. 1396a(a)(68) if the provider is an entity that received or made at least $5 million in Medicaid payments during the prior federal fiscal year;

(8) to furnish to the MassHealth agency its national provider identifier (NPI), if eligible for an NPI, and include its NPI on all claims submitted under MassHealth; and

(9) to permit the Centers for Medicare & Medicaid Services (CMS) and the MassHealth agency, and their agents and designated contractors to conduct unannounced on-site inspections of any and all provider locations.

(D) The provider must terminate a provider contract only by written notice to the MassHealth agency and such termination will be effective no earlier than 30 days after the date on which the MassHealth agency actually receives such notice, unless the MassHealth agency explicitly specifies or agrees to an earlier effective date. Any provision allowing for termination upon written notice does not constitute the MassHealth agency's specification of or agreement to an earlier effective date.

The Massachusetts Administrative Code titles are current through Register No. 1424, dated August 21, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 450.223, 130 MA ADC 450.223

End of Document

Code of Massachusetts Regulations
Title 130: Division of Medical Assistance
Chapter 450.000: Administrative and Billing Regulations (Refs & Annos)

130 CMR 450.246

450.246: Hearings: Procedure

Currentness

The hearing is conducted in accordance with M.G.L. c. 30A, §§ 9, 10, and 11, and 801 CMR 1.00: *Compliance, Reporting and Auditing for Human and Social Services,* as modified or supplemented by 130 CMR 450.000.

The Massachusetts Administrative Code titles are current through Register No. 1424, dated August 21, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 130, § 450.246, 130 MA ADC 450.246

End of Document

Code of Massachusetts Regulations
Title 801: Executive Office for Administration and Finance
Chapter 1.00: Standard Adjudicatory Rules of Practice and Procedure (Refs & Annos)

801 CMR 1.01

1.01: Formal Rules

Currentness

<Emergency action effective Aug. 06, 2020.>

(1) Preamble. 801 CMR 1.01 of the Standard Rules of Adjudicatory Practice and Procedure is a self-contained segregable body of regulations of general applicability for proceedings in which formal rules are desired. An Agency must determine for any class of hearing whether to hold hearings under 801 CMR 1.01 or 801 CMR 1.02 Informal/ Fair Hearing Rules. Agencies shall determine based on such factors as: the volume of cases held; whether claimants are represented by counsel; the complexity of the issues; or the applicability of Federal fair hearings procedures. All notices from which an Adjudicatory Proceeding can be claimed shall state which rules apply, whether formal under 801 CMR 1.01, or informal under 801 CMR 1.02. In addition, all notices shall contain a notice printed in English, Spanish, Portuguese, Italian, Greek, French and Chinese that informs the reader that the document is important and should be translated immediately.

(2) Scope, Construction and Definitions.

(a) Scope 801 CMR 1.00 governs the conduct of formal Adjudicatory Proceedings of all Commonwealth agencies governed by M.G.L. c. 30A.

(b) Construction. 801 CMR 1.00 shall be construed to secure a just and speedy determination of every proceeding.

(c) Definitions. Refer to all definitions included in M.G.L. c 30A. In addition, the following words when used in 801 CMR 1.01 shall have the following meanings:

Authorized Representative. An attorney, legal guardian or other person authorized by a Party to represent him in an Adjudicatory Proceeding.

Electronic Medium. Any device used to transmit information electronically, including but not limited to facsimile and e-mail.

Hand Delivery. Delivery by any method other than pre-paid U.S. mail, including but not limited to private mail services.

Petitioner The Party or Agency who initiates an Adjudicatory Proceeding.

Presiding Officer The individual(s) authorized by law or designated by the Agency to conduct an Adjudicatory Proceeding.

Respondent. The Party or Agency who must answer in an Adjudicatory Proceeding.

(3) Representation

(a) Appearance. An individual may appear in his or her own behalf, or may be accompanied, represented and advised by an Authorized Representative. An authorized officer or employee may represent a corporation, an authorized member may represent a partnership or joint venture, and an authorized trustee may represent a trust.

(b) Notice of Appearance. An Authorized Representative shall appear by filing a written notice with the Agency or Presiding Officer. Notice shall contain the name, address and telephone number, as well as facsimile number and email address of the Authorized Representative and of the Party represented, and may limit the purpose of the appearance. The filing by an attorney of any pleading, motion or other paper shall constitute an appearance by the attorney who sent it, unless otherwise stated.

(4) Timely Filing. Parties must file papers required or permitted to be filed with the Agency under 801 CMR 1.00, or any provision of applicable law, within the time provided by statute or Agency rule. Unless otherwise provided by applicable statute or regulation, Parties must file papers at an office of the Agency or with the Presiding Officer.

(a) Manner of Filing. All documents must be filed by email, unless otherwise ordered by the Presiding Officer for good cause or the Respondent or Petitioner lacks access to sufficient Electronic Medium. Agencies must use all reasonable efforts to inform the general public of the appropriate email address where documents will be accepted, such as posting the email address on the Agency website or by other means. Papers filed by Electronic Medium shall be deemed filed at the office of the Agency or with the Presiding Officer on the date received by the Agency or Officer during usual business hours, but not later than 5:00 P.M. Parties are reminded of the prohibition concerning *ex parte* communications contained in 801 CMR 1.03(6). Parties must refrain from contacting the Presiding Officer about a matter, unless permission is granted by the Presiding Officer and a copy of the communication is sent to all other parties. If a party lacks access to sufficient Electronic Medium, Papers filed by U.S. mail shall be deemed filed on the date contained in the U.S. postal cancellation stamp or U.S. postmark, and not the date contained on a postal meter stamp. Papers filed by all other means shall be considered hand-delivered, and shall be deemed filed on the date received by the Agency during usual business hours. Any recipient of papers filed as provided in 801 CMR 1.01 (4)(a) shall stamp papers with the date received. The recipient shall provide on request date receipts to Persons filing papers by hand-delivery during business hours. The Presiding Officer shall make his or her best efforts to process filings delivered by mail and conduct hearings in a reasonable and timely manner.

(b) Papers received after usual business hours shall be deemed filed on the following business day.

(c) Notice of Agency Actions. Notice of actions and other communications from the Presiding Officer or adjudicating Agency, or its designee, shall be delivered by email, unless otherwise agreed upon by the parties, or directed by the Presiding Officer for good cause, or the Respondent or Petitioner lacks access to sufficient Electronic Medium. Notice of actions and other communications by mail shall be presumed to be received upon the day of hand-delivery or, if mailed, three days after deposit in the U.S. mail. The postmark shall be evidence of the date of mailing.

(d) Computation of Time. Unless otherwise specifically provided by 801 CMR 1.00 or by other applicable law, computation of any time period referred to in 801 CMR 1.00 shall begin with the first day following the act which initiates the running

of the time period. The last day of the time period is included, unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Agency is closed, when the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the Agency is closed shall be excluded.

(e) Extension of Time. The Agency or Presiding Officer may, for good cause shown, extend any time limit contained in 801 CMR 1.00, unless otherwise restricted by law. All requests for extensions of time shall be made by motion before the expiration of the original or next previous extended time period. The filing of such motion shall toll the time period sought to be extended until the Presiding Officer acts on the motion. 801 CMR 1.01(4)(e) shall not apply to any limitation of time prescribed by statute, unless extensions are permitted by the applicable statute

(5) Filing Format.

(a) Title. Papers filed with an Agency shall be titled with the name of the Agency, the docket number of the case if known, the names of the Parties and the nature of the filing.

(b) Signatures. Documents filed by email will be deemed to be signed by the sender, and must include the sender's email address, street address, and telephone number. Papers filed with an Agency shall be signed and dated by an unrepresented Party, or by a Party's Authorized Representative, and shall state the address and telephone number of the Person signing the document. Such signature constitutes the signer's certification that he has read the document and knows the content thereof, that statements contained therein are believed to be true, that it is not interposed for delay and that if the document has been signed by an Authorized Representative that he has full power and authority to do so.

(c) Designation of Agency. An Agency designated as a Party to Adjudicatory Proceedings shall be designated by its name and not by the individual names of those constituting the Agency. If while the Adjudicatory Proceeding is pending, a change of employees occurs within the Agency, the Adjudicatory Proceeding shall not abate, and no substitution of Parties shall be necessary.

(d) Form.

1. Size and Printing Requirements. All papers filed for possible inclusion in the record shall be clear and legible and shall be presented in accordance with the standards of the Presiding Officer, if any, or on Agency forms whenever available.

2. Agency Format. An Agency may provide forms to be used for specific purposes by any Person or Party and use of forms provided shall be mandatory.

(e) Maintenance of Files. The papers filed in a given case shall be consolidated and maintained in an individual folder under a unique case or docket number with additional copies as the Agency or applicable statute may require.

(f) Service of Copies. In addition to the filing of any papers with the Agency, the Party filing papers shall serve a copy on all other Parties to the proceedings by email, unless a party lacks access to sufficient Electronic Medium or the Presiding Officer has ordered that papers may be filed by a method other than email, such as either delivery in hand or prepaid

U.S. Mail. All papers filed with the Agency shall be accompanied by a statement certifying the date copies have been served, specifying the mode of service, the name of the Party served and the address of service. Papers served by Electronic Medium shall indicate the date transmitted and the telephone number or electronic address used for transmittal. Failure to comply with this rule shall be grounds for the Agency to refuse to accept papers for filing. The means of service of copies should take no longer than the means of filing.

(6) Initiation of Formal Adjudicatory Proceedings.

(a) Agency Notice of Action. When an Agency initiates a proceeding against a Person regarding an Agency action or intended action, the Agency shall provide the Person with notice of the action or an order to show cause why the action should not be taken. The notice or order shall state the reason for the action. It shall specify in numbered paragraphs the specific facts relied upon as the basis for the action, the statute(s) or regulations authorizing the Agency to take action, and, in the case of a notice, any right to request an Adjudicatory Proceeding.

(b) Claim for Adjudicatory Proceeding. Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or Agency rule. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party.

(c) Form and Content of Claims. The notice of claim for an Adjudicatory Proceeding shall identify the basis for the claim. The notice shall state clearly and concisely the facts upon which the Party is relying as grounds, the relief sought and any additional information required by statute or Agency rule.

(d) Answer.

1. Answer to Claim. Except as statute or Agency rule may otherwise prescribe, within 21 days of receipt of a notice of claim for an Adjudicatory Proceeding, a Respondent shall file an answer to the initiating pleading. The answer shall contain full, direct and specific answers. The answer shall admit, deny, further explain, or state that the Respondent has insufficient knowledge to answer with specificity the initiating Party's allegations or claims. An allegation of inability to admit or deny for lack of information shall be treated as a denial. The answer shall also contain all affirmative defenses which the Respondent claims and may cite any supporting statute or regulation. All allegations contained in an initiating pleading which are neither admitted nor denied in the answer shall be deemed denied.

2. Answer to Order to Show Cause. Except as statute or Agency rule may otherwise prescribe, within 21 days of receipt of an order to show cause, a Respondent shall file an answer thereto. The answer shall contain full, direct and specific answers. The answer shall admit, deny, further explain, or state that the Respondent has insufficient knowledge to answer with specificity the initiating Party's allegations or claims. An allegation of inability to admit or deny for lack of information shall be treated as a denial. The answer shall also contain all affirmative defenses which the Respondent claims and may cite any supporting statute or regulation. All allegations contained in an initiating pleading which are neither admitted nor denied in the answer shall be deemed denied.

(e) Agency Answer. An Agency shall not be required to file an answer if, at the time the Agency took the action being appealed, the Agency disclosed to the Petitioner the material facts on which the Agency relied in taking such action and the statutes and/or regulations which authorized or required the Agency to take such action.

(f) Joinder of Additional Parties and Amendments of Pleadings. If a Person is later joined or allowed to intervene, or allowed as a substitute Party, the Presiding Officer, upon his or her own initiative or upon the motion of any Party, may establish reasonable times for the filing of pleadings or other documents by any additional Party. The Presiding Officer may allow the amendment of any pleading previously filed by a Party upon conditions just to all Parties, and may order any Party to file an Answer or other pleading, or to reply to any pleading.

(g) Withdrawal. Any Party may, by motion, apply to withdraw a claim, a defense, or a request for action or for review, upon terms established by Agency rule, or which the Presiding Officer may allow in fairness to all Parties.

(7) Motions.

(a) General Requirements.

1. Presentations and Responses. An Agency or Party may by motion request the Presiding Officer to issue any order or take any action not inconsistent with law or 801 CMR 1.00. Motions may be made in writing at any time after the commencement of an Adjudicatory Proceeding or orally during a hearing. Each motion shall set forth the grounds for the desired order or action and state whether a hearing is desired. Within seven days after a written motion is filed with the Presiding Officer, any other Agency or Party may file written responses to the motion and may request a hearing. Responses to oral motions may be made orally at the hearing or in writing filed within seven days according to the discretion of the Presiding Officer.

2. Action on Motions. The Agency or Presiding Officer shall, unless the Parties otherwise agree, give at least three days' notice of the time and place for the hearing when the Agency or Presiding Officer determines that a hearing on the motion is warranted. The Agency or Presiding Officer may grant requests for continuances for good cause shown or may, in the event of unexcused absence of a Party who received notice, permit the hearing to proceed. The unexcused Party's written motion or objections, if any, are to be regarded as submitted on the written papers. The Agency or Presiding Officer may rule on a motion without holding a hearing if delay would seriously injure a Party, or if presentation of testimony or oral argument would not advance the Agency or Presiding Officer's understanding of the issues involved, or if disposition without a hearing would best serve the public interest. The Agency or Presiding Officer may otherwise act on a motion when all Parties have responded or the deadline for response has expired, whichever occurs first. If the Agency or Presiding Officer acts on the motion before all Parties have responded and the time has not expired, the ruling may be subject to modification or rescission upon the filing of one or more subsequent but timely responses.

3. Scope of Factual Basis for Hearing on Motions. The Parties may offer at a hearing on a motion evidence relevant to the particular motion. This evidence may consist of statements which are presented orally by sworn testimony, by affidavit, or which appear in admissible records, files, depositions or answers to interrogatories.

(b) Motion for More Definite Statement. If a pleading to which a responsive pleading is required is so vague or ambiguous that a Party cannot reasonably frame a response, the Party may, within the time permitted for such response, move for a more definite statement before filing its answer. The motion shall set forth the defects complained of and the details desired. If the motion is granted, the more definite statement shall be filed within ten days of the order allowing the motion or within the deadline determined by the Agency or Presiding Officer.

(c) Motion to Strike. A Party may move to strike from any pleading, or the Agency or Presiding Officer may on its own motion strike, any insufficient allegation or defense, or any redundant, immaterial, impertinent or scandalous matter.

(d) Motion to Continue. For good cause shown a scheduled hearing may be continued to another date:

1. by agreement of all Parties with the permission of the Presiding Officer, provided the Presiding Officer receives a letter confirming the request and agreement before the hearing date; or

2. by written motion to continue made by a Party at least three days prior to the hearing date; or

3. by the Presiding Officer on his or her own motion or upon a motion to continue made at the scheduled hearing.

(e) Motion to Change Venue. Any Party may move to have a hearing held in a place other than the scheduled location. In deciding such motions the Presiding Officer shall consider the objections of Parties, the transportation expenses of the Presiding Officer, the possibility of conducting the hearing by means of telecommunication facilities, the availability of either stenographic services or a suitable recording system, the availability of a neutral and appropriate hearing site, the availability of witnesses because of their place of residence or state of health, and other appropriate matters.

(f) Motion for Speedy Hearing. Upon motion of any Party and upon good cause shown, the Presiding Officer may advance a case for hearing.

(g) Motion to Dismiss.

1. Grounds. Upon completion by the Petitioner of the presentation of his or her evidence, the Respondent may move to dismiss on the ground that upon the evidence, or the law, or both, the Petitioner has not established his or her case. The Presiding Officer may act upon the dismissal motion when presented, or during a stay or continuance of proceedings, or may wait until the close of all the evidence.

2. Failure to Prosecute or Defend. When the record discloses the failure of a Party to file documents required by statute or by 801 CMR 1.00, to respond to notices or correspondence, to comply with orders of the Presiding Officer, or otherwise indicates an intention not to continue with the prosecution of a claim, the Presiding Officer may initiate or a Party may move for an order requiring the Party to show cause why the claim shall not be dismissed for lack of prosecution. If a Party fails to respond to such order within ten days, or a Party's response fails to establish such cause, the Presiding Officer may dismiss the claim with or without prejudice.

3. Dismissal for Other Good Cause. The Presiding Officer may at any time, on his or her own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided.

(h) Motion for Summary Decision. When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues.

(i) Substitution of Parties. The Agency or Presiding Officer may, on motion, at any time in the course of a proceeding, permit substitution of Parties as justice or convenience may require.

(j) Consolidation of Proceedings. If there are multiple proceedings which involve common issues, a Party shall notify the Agency or Presiding Officer of this fact, stating with particularity the common issues. The Agency or Presiding Officer may with the concurrence of all parties and any other tribunal that may be involved, consolidate the proceedings.

(k) Motion to Reopen. At any time after the close of a hearing and prior to a decision being rendered, a Party may move to reopen the record if there is new evidence to be introduced. New evidence consists of newly discovered evidence which by due diligence could not have been discovered at the time of the hearing by the Party seeking to offer it. A motion to reopen shall describe the new evidence which the Party wishes to introduce.

(l) Motion for Reconsideration. After a decision has been rendered and before the expiration of the time for filing a request for review or appeal, a Party may move for reconsideration. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A, § 14(1) for the purposes of tolling the time for appeal.

(8) Discovery.

(a) General Policy and Protective Orders. The Parties are encouraged to engage in voluntary discovery procedures. In connection with document requests, interrogatories, depositions or other means of discovery, the Presiding Officer may make any order which justice requires to protect a Party or Person from annoyance, embarrassment, oppression, or undue burden or expense. Orders may include limitations on the method, time, place and scope of discovery and provisions for protecting the secrecy of confidential information or documents.

(b) Document Request Procedure and Costs. After a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, a Party may serve another Party or Agency with a document request which lists with reasonable specificity items requested for inspection which are in the possession, custody or control of the Party or Agency requested to provide them. A Party or Agency served with a document request shall respond within 30 days or as otherwise determined by the Presiding Officer. The Presiding Officer may require a Party requesting documents to pay the Party or Agency responding to a document request the fee per page determined by the Executive Office for Administration and Finance.

(c) Depositions: When Permitted. After a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, the Presiding Officer may, upon motion by a Party, order the taking of the testimony of any Person by deposition before any officer authorized to administer oaths. The motion shall specify the name and address of each deponent and the reasons for the deposition. The Presiding Officer shall allow the motion only upon showing that the parties have agreed to submit the deposition in lieu of testimony by the witness, or the witness cannot appear before the Presiding Officer without substantial hardship. The motion shall only be allowed upon a showing by the moving Party that the testimony sought is significant, relevant, and not discoverable by alternative means. Motions for depositions shall be considered and acted upon in accordance with 801 CMR 1.01(7)(a).

(d) Depositions: How Taken, Signing. Depositions shall be taken orally before an officer having power to administer oaths. Each deponent shall be duly sworn. In instances where sincere scruple forbids the taking of an oath, a person may affirm with the same legal effect as having been sworn. Any Party shall have the right to cross-examine. The questions asked, the answers given, and any objections shall be recorded. The Presiding Officer shall rule only on objections accompanied by a reason and only in regard to the stated reason. Each deponent shall have the option of reviewing and affirming the deposition transcript and of indicating an affirmance in whole or in part by signing a statement to that effect on the title page of the transcript. The deponent may waive the reviewing and signing, in which case the officer shall state the fact of the waiver in the officer's certification, and the transcript shall then have the same status as if signed by the deponent. Subject to appropriate rulings on objections, the Presiding Officer may receive the deposition in evidence, as if the testimony contained therein had been given by a witness in the proceeding.

(e) Recording by Other than Stenographic Means. The Presiding Officer may on motion permit the testimony at a deposition to be recorded by other than stenographic means, in which event the Presiding Officer's authorization shall designate the manner of recording, preserving, and filing of the record of the deposition and may include other provisions to assure that the recorded testimony will be accurately preserved.

(f) Certification of Transcript. A duplicate transcript of the deposition shall be certified by the officer before whom the deposition was taken. When the deposition is introduced into evidence, the Party requesting the deposition shall order a duplicate copy of the transcript and forward a copy to the Presiding Officer.

(g) Interrogatories. With the approval of the Agency or Presiding Officer, after a request for an Adjudicatory Proceeding has been filed or an order to show cause issued, a Party may serve written interrogatories upon any other Party for the purpose of discovering relevant information not privileged and not previously supplied through voluntary discovery. Interrogatories may be served by Hand-delivery, pre-paid U.S. mail or Electronic Medium. A duplicate of all interrogatories shall be simultaneously filed with the Presiding Officer. No Party, without the approval of the Presiding Officer, shall serve more than a total of 30 interrogatories either concurrently or serially including subsidiary or incidental questions. A Party may not serve any interrogatories less than 45 days before the scheduled hearing, without the approval of the Agency or Presiding Officer.

(h) Answers to Interrogatories. Each interrogatory shall be separately and fully answered under the penalties of perjury, unless an objection to the interrogatory with supporting reasons are stated in *lieu* of an answer. An answer shall be served within 30 days of receipt of an interrogatory, or within such other time as the Presiding Officer may specify. A duplicate of all answers to interrogatories shall be simultaneously filed with the Presiding Officer.

(i) Motion for Order Compelling Discovery. A Party may file with the Presiding Officer, subject to 801 CMR 1.01(7)(a), a motion to compel discovery if a discovery request is not honored, or only partially honored, or interrogatories or questions at deposition are not fully answered. If the motion is granted and the other Party fails without good cause to obey an order to provide or permit discovery, the Presiding Officer, before whom the action is pending, may make orders in regard to the failure as are just, including one or more of the following:

1. An order that designated facts shall be established adversely to the Party failing to comply with the order; or

2. An order refusing to allow the disobedient Party to support or oppose designated claims or defenses, or prohibiting him or her from introducing evidence on designated matters.

(9) Intervention and Participation.

(a) Intervention. Any Person not initially a Party, who may be substantially and specifically affected thereby and wishes to intervene or participate in an Adjudicatory Proceeding shall file a written petition for leave to be allowed to do so. Except as otherwise provided in 801 CMR 1.01(9), the petition shall be subject to 801CMR 1.01(7)(a).

(b) Form and Content. The petition shall state the name and address of the Person filing the petition. It shall describe the manner in which the Person making the petition may be affected by the proceeding. It shall state why the Agency or Presiding Officer should allow intervention or participation, any relief sought, and any supporting law.

(c) Filing the Petition. The petition may be filed at any time following a request for an Adjudicatory Proceeding or an order to show cause, but in no event later than the date of hearing. Petitions may be allowed at the discretion of the Presiding Officer, for any Person who is likely to be substantially and specifically affected by the proceeding, provided all existing Parties are given notice and an opportunity to respond pursuant to 801 CMR 1.01(7)(a).

(d) Rights of Intervenors. The Presiding Officer may permit any Person who is likely to be substantially and specifically affected by the proceeding. Any Person permitted to intervene shall have all the rights of a Party, subject to the discretion of the Presiding Officer to avoid undue delay or unnecessary duplication of evidence, and shall be subject to all limitations imposed upon a Party.

(e) Rights of Participants. The Presiding Officer may permit any Person who may be affected by a proceeding may be permitted to participate. Permission to participate shall be limited to the right to argue orally at the close of a hearing and to file an amicus brief, but shall not necessarily make the Person allowed to participate a Party in interest who may be aggrieved by any result of the proceeding. A Person who petitioned to intervene and who was allowed only to participate may participate without waiving his or her rights to administrative or judicial review of the denial of his or her motion to intervene.

(f) Intervention to Protect the Environment. Any group of ten or more Persons may intervene collectively as a Party in any Adjudicatory Proceeding according to M.G.L. c. 30A, § 10A, provided that intervention is limited to the issue of actual or probable damage to the environment as defined in M.G.L. c. 214 § 7A, and the elimination or reduction thereof. The petition to intervene pursuant to M.G.L. c. 30A, § 10A shall also state the names and addresses of the members of the group

and identify the member of the group, or the group's attorney, or the group's agent, who will be the group's representative before the Presiding Officer. The representative shall have the sole authority to sign papers for the group and to accept service for the group. Any Paper served on the representative of the group shall be deemed served on the entire group. If no representative is specifically stated in the petition, the first Person mentioned in the motion to intervene as a member of the group shall be deemed the representative of the group. A group that is permitted to intervene as a Party shall be collectively deemed a single Party as defined in 801 CMR 1.00.

(g) Permissive Reference. When a Party to an action relies upon any rule or regulation issued by an Agency, other than the one conducting the proceeding as grounds for a claim or defense, the Agency having promulgated the rule or regulation on timely application by a Party and in the discretion of the Presiding Officer, or at the initiative of the Presiding Officer, may offer a relevant construction, interpretation or application of the rule or regulation in aid of the resolution of one or more of the issues involved in the Adjudicatory Proceeding. Any request to the promulgating Agency shall be in writing and present a neutral statement of the issue or issues possibly affected by the rule or regulation. The promulgating Agency may respond in writing as promptly as its resources allow, but in no event later than 30 days from its receipt of the request. The promulgating Agency may expressly decline to respond and need not justify its position, and its failure to respond within the time limited shall be deemed a declination to do so.

(10) Hearings and Conferences.

(a) Pre-hearing Conference. The Presiding Officer may initiate or upon the application of any Party, may call upon the Parties to appear for a conference to consider;

1. the simplification or clarification of the issues;

2. the possibility of obtaining stipulations, admissions, agreements on matters already of record, or similar agreements which will reduce or eliminate the need of proof;

3. the limitation of the number of expert witnesses, or avoidance of cumulative evidence, if the case is to be heard;

4. the possibility of an agreement disposing of any or all issues in dispute; and

5. such other matters as may aid in the disposition of the Adjudicatory Proceeding.

Those matters agreed upon by the Parties shall be reduced to writing and signed by them, and the signed writing shall constitute a part of the record. The scheduling of a pre-hearing conference shall be according to Agency rule or, in the absence of rules, solely within the discretion of the Presiding Officer.

(b) Stipulations. In the discretion of the Presiding Officer, the Parties may, by written stipulation filed with the Presiding Officer at any stage of the proceeding, or by oral stipulation made at a hearing, agree as to the truth of any fact pertinent to the proceeding. The Presiding Officer may require parties to propose stipulations. In making findings, the Presiding Officer need not be bound by a stipulation which is in contravention of law or erroneous on its face.

(c) Submission without a Hearing. Any Party may elect to waive a hearing and submit his or her case upon written submissions. Submission of a case without a hearing does not relieve the Parties from the necessity of proving the facts supporting their allegations or defenses on which a Party has the burden of proof.

(d) Conduct of Hearing.

1. Decorum. All Parties, their Authorized Representatives, witnesses and other Persons present at a hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in any court. Where such decorum is not observed, the Presiding Officer may take appropriate action. Appropriate action may include refusal to allow a disruptive Person to remain in the hearing room and, if such Person is a Party, to allow participation by representative only.

2. Duties of Presiding Officer. The Presiding Officer shall conduct the hearing, administering an oath or affirmation to all witnesses, making all decisions on the admission or exclusion of evidence and resolving questions of procedure. The Presiding Officer shall file a decision or recommended decision with the Agency within a reasonable time after the close of the hearing.

(e) Order of Proceedings.

1. Opening. In the usual case, except as otherwise required by law, in hearings resulting from a notice of claim of an adjudicatory proceeding, the Party filing the claim shall open and first present evidence; in hearings resulting from orders to show cause, the Agency issuing the order shall open and first present evidence.

2. Order of Presentation. The Party taking the position contrary to that of the Party opening shall have the right to present his or her position upon completion of the opening Party's case.

3. Closing. The Party opening shall argue last in summation.

4. Discretion of the Presiding Officer. The Presiding Officer may, when the evidence is peculiarly within the knowledge of one Party, or when there are multiple Petitioners, or when he or she otherwise determines appropriate, direct who shall open and may otherwise determine the order of presentation.

(f) Presentation of Evidence. All Parties shall have the right to present documentary and oral evidence, to cross-examine adverse or hostile witnesses, to interpose objections, to make motions and oral arguments. Cross-examination is to follow the direct testimony of a witness. Whenever appropriate, the Presiding Officer shall permit reasonable redirect and recross-examination and allow a Party an adequate opportunity to submit rebuttal evidence. Except as otherwise provided, evidence of the Respondent shall be presented after the presentation of the Petitioner's case in chief. The Respondent shall first argue in summation.

1. Oath. A witness's testimony shall be under oath or affirmation.

2. Offer of Proof. An offer of proof made in connection with a ruling of the Presiding Officer rejecting or excluding proffered testimony shall consist of a statement of the substance of the evidence which the Party contends would be adduced by the testimony. If the excluded evidence consists of evidence in documentary or written form, it shall be filed and marked for identification and shall constitute the offer of proof.

(g) Subpoenas. The Agency or Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of M.G.L. c. 30A, § 12.

(h) Administrative Notice. The Presiding Officer may take notice of fact(s), pursuant to the requirements of M.G.L. c. 30A, § 11(5).

(i) Transcript of Proceedings.

1. Stenographic or Recorded Records and Transcripts. Except where a Party elects to provide a public stenographer as provided herein, the testimony and argument at the hearing shall be recorded either stenographically or by Electronic Medium. The Presiding Officer shall arrange for verbatim transcripts of the proceedings to be supplied at cost to any Party upon request, at the Party's own expense. The Agency may elect to supply a copy of the tape, disc or other audio-visual preserving medium employed at the proceeding to record its events in *lieu* of a verbatim transcript. Any Party, upon motion, may be allowed to provide a public stenographer to transcribe the proceedings at the Party's own expense upon terms ordered by the Presiding Officer. In this event, a verbatim transcript shall be supplied to the Presiding Officer at no expense to the Agency.

2. Correction of Transcript. Corrections of the official hearing transcript may be made only to make it conform to the evidence presented at the hearing. Transcript corrections, agreed to by opposing Parties, may be incorporated into the record, if and when approved by the Presiding Officer. If opposing Parties cannot agree on transcript corrections, any Party may report the fact to the Presiding Officer, who may call for the submission of proposed corrections and shall determine what corrections, if any, are to be made with reliance on his or her own notes.

(j) Hearing Briefs. At the close of the taking of testimony and prior to his or her rendering a decision, the Presiding Officer may in his or her discretion call for and fix the terms of the filing of written summaries and arguments on the evidence and/or proposed findings of fact and conclusions of law.

(k) Settling the Record.

1. Contents of Record. The record of the proceeding shall consist of the following items: notices of all proceedings; all motions, pleadings, briefs, memoranda, petitions, objections, requests and rulings; evidence received, including deposition transcripts, and offers of proof with the arguments; statements of matters officially noticed if not otherwise documented; interrogatories and the answers; all findings, decisions and orders presented whether recommended or final; transcripts of the hearing testimony, argument, comments or discussions of record or the tape, disc or preserving medium; and any other item the Presiding Officer has specifically designated be made a part of the record. The record shall at all reasonable times be available at the offices of the Agency or other designated location for inspection by the Parties.

2. Evidence after Record Closed. No evidence shall be admitted after the close of the record, unless the Presiding Officer reopens the record.

3. Exceptions. Formal exceptions to rulings on evidence and procedure are unnecessary. It is sufficient that a Party, at the time that a ruling is made or sought, makes known his or her objection to and grounds for any action taken. If a Party does not have an opportunity to object to a ruling at the time it is made, or to request a particular ruling at an appropriate time, the Party may submit a written statement of his or her specific objections and grounds within three days of notification of action taken or refused. Oral or written objections to evidentiary rulings shall be part of the record.

(11) Decisions. Unless otherwise provided by statute, decisions shall be made as follows:

(a) Direct Agency Decisions. The Agency may by regulation elect to preside at the reception of evidence in all cases. In the absence of such regulation, the Agency may elect to preside at the reception of evidence in particular cases and shall exercise this election by so stating in the notice scheduling the time and place for the Adjudicatory Proceeding in the particular case. The decision of the Agency as Presiding Officer shall be the final Agency decision.

(b) Initial Decisions. A Presiding Officer other than the Agency who presided at the reception of evidence shall render a decision as provided in M.G.L. c. 30A § 11(8). The decision of the Presiding Officer shall be called an initial decision. The Presiding Officer shall promptly provide the parties with a copy of his or her decision when filed with the Agency.

(c) Tentative Decisions. If the Agency elects to render a decision on the record without having presided at the reception of evidence, either by regulation or by statement in the notice scheduling the hearing, the initial decision shall also become a tentative decision.

1. Objections and Response. The Parties shall have the opportunity to file written objections to the tentative decision with the Agency, which may be accompanied by supporting briefs. The Parties shall have 30 days from the filing of the tentative decision or the transcript corrections under 801 CMR 1.01(10)(i)2., whichever occurs last, to file written objections. Parties may file responses to objections within 20 days of receipt of a copy of the objections. The Agency may order or allow the Parties to argue orally. A Party requesting oral argument shall file the request with the Party's written objections or response.

2. Agency Action on the Tentative Decision. The Agency may affirm and adopt the tentative decision in whole or in part, and it may recommit the tentative decision to the Presiding Officer for further findings as it may direct. The same procedural provisions applicable to the initial filing of the tentative decision shall apply to any refiled tentative decision after recommittal. If the Agency does not accept the whole of the tentative decision, it shall provide an adequate reason for rejecting those portions of the tentative decision it does not affirm and adopt. However, the Agency may not reject a Presiding Officer's tentative determinations of credibility of witnesses personally appearing. The Agency's decision shall be on the record, including the Presiding Officer's tentative decision, and shall be the final decision of the Agency not subject to further Agency review.

3. Failure to Issue Final Decision. If the Agency fails to issue a final decision within 180 days of the filing or refiling of the tentative decision, the initial decision shall become the final decision of the Agency, not subject to further Agency review.

(d) Final Decisions. Every decision shall be made as required in M.G.L. c. 30A § 11(8), and shall be mechanically or electronically printed, and signed by the Presiding Officer or by those members of the Agency making the decision. A majority of the members constituting the Agency or the Agency panel authorized by the Agency to decide the case shall make direct Agency decisions. A final decision shall incorporate by reference those portions of an initial or tentative decision that are affirmed and adopted, and may expressly incorporate other portions it modifies or rejects with its reasons therefor. A final decision by an Agency under 801 CMR 1.01(11)(c) shall make appropriate response to any objections filed in regard to an initial or tentative decision.

(e) Decision Maker Unavailable. When a Presiding Officer becomes unavailable before completing the preparation of the initial decision, the Agency shall appoint a successor to assume the case and render the initial decision. If the presentation of evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record. Otherwise, the successor may either proceed with evidence or require presentation of evidence again from the beginning. The Agency shall provide without cost to all Parties and the successor a copy of the official verbatim transcript, or completed portions thereof, if not previously provided.

(f) Notice of Decision. The Agency or Presiding Officer shall promptly provide all Parties with a copy of every Agency decision or order when filed and otherwise give prompt notice of all Agency actions from which any time limitation commences.

(12) Telecommunications. The Presiding Officer may designate that all or a portion of a hearing be conducted with one or more participants situated in different locations and communicating through the medium of one or more telecommunication devices, including telephone and video conferencing, unless the Respondent or Petitioner lacks access to sufficient Electronic Medium.

(13) Further Appeal. After the issuance of a final decision, except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any Agency in an Adjudicatory Proceeding shall be entitled to a judicial review thereof in accordance with M.G.L. c. 30A, § 14.

(14) Withdrawal of Exhibits and Recording Media. Three years after a decision in a given case has become final and all periods for requesting further review, whether administrative or judicial, which may require reference to original exhibits or the reproduction or transcription of events recorded stenographically or by Electronic Medium, have lapsed, an Agency or Presiding Officer may in its discretion:

(a) permit the withdrawal of original exhibits or any part thereof by the Party or Person entitled thereto; and

(b) withdraw from its file stenographic or electronic media employed to record the events of the Adjudicatory Proceedings before it and dispose of them as it sees fit.

Credits

History: 1424 Mass. Reg. 63, amended (emergency) eff. Aug. 6, 2020.

The Massachusetts Administrative Code titles are current through Register No. 1424, dated August 21, 2020. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 801, § 1.01, 801 MA ADC 1.01

End of Document

18 Mass.L.Rptr. 504
Superior Court of Massachusetts.

David BOVARNICK et al.
v.
FLEET BANK OF MASSACHUSETTS, N.A.

Nos. 023490, 86633.
|
Nov. 16, 2004.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JULIAN T. HOUSTON, Justice.

***1** The plaintiffs, David and Cheryl Bovarnick (the "Bovarnicks") filed this action alleging breach of contract (Count I), breach of fiduciary duty (Count II), and violation of M.G.L.c. 93A, §§ 1, 2 (Count III) by the Defendant Fleet National Bank ("Fleet") arising from the purchase of certificates of deposit ("CD"). Fleet moves for summary judgment on all three claims. Fleet argues that Count I is barred by the statute of limitations and Count II is barred because the relationship Fleet and the Bovarnicks have is a contractual relationship. Finally, Fleet contends it is entitled to judgment as a matter of law on Count III because the Plaintiffs have not established the necessary elements for a violation of Chapter 93A.

A hearing on the Defendant's Motion for Summary Judgment was held before me and the plaintiffs were granted leave and filed a Supplemental Memorandum In Opposition to Defendant's Motion for Summary Judgment and Fleet filed a Reply to Plaintiffs' Supplemental Memorandum in Opposition. For the reasons discussed below, the Defendant's motion for summary judgment on all counts is *ALLOWED.*

FACTUAL BACKGROUND

The undisputed facts, viewed in the light most favorable to non-moving party, are as follows.

In 1984 and 1988, the Bovarnicks opened CD accounts with Mutual Bank for Savings. Each account provided that its six-month deposit period would be automatically renewed for successive terms unless the deposit was withdrawn. In 1989, the Bovarnicks opened another CD account with First Mutual of Boston, which also provided for automatic renewal for successive terms of the six-month deposit period. In September 2001, certain deposits formerly held by Mutual Bank for Savings and/or First Mutual of Boston were acquired by the First National Bank of Boston, Fleet's predecessor in interest, including the three CD accounts held by the Bovarnicks.

In October 2001, the Bovarnicks inquired into redeeming said CD accounts at a Fleet bank branch in Needham. The plaintiffs claim they never withdrew any funds from any of the CD accounts. Despite investigation, the customer service representative could not locate any information concerning the CD accounts. Upon further investigation and according to its account balance spread sheet, Fleet discovered the funds from the two CD accounts had been withdrawn on July 27, 1994 and August 15, 1994 but were unable to locate the cashier's checks representing the redemption of the CD accounts at issue due to Fleet's document six-year retention policy and practice. On August 20, 2002, the Bovarnicks filed a three-count complaint against Fleet.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716 (1991).

Count I-Breach of Contract

***2** Fleet contends they are entitled to judgment as a matter of law for Count I because the claim is barred by the statute of limitations.

The statute of limitations applicable to breach of contract claims is six years from the accrual of the cause of action. M.G.L.c. 260, § 2 ("actions of contract ... shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues"). The statutory period begins to run when the plaintiff knew or should have known of the cause of action. *Tarygeta v. Varian Associates,* 436 Mass. 217, 229 (2002); *Campanella & Cardi Construction Co. v. Commonwealth,* 351 Mass. 184, 185 (1966). It is Fleet's contention that the cause of action accrued in 1994 when the funds were withdrawn from the CD accounts (the alleged breach) and the plaintiffs' claim is barred because they did not file the Complaint until 2002, eight years after the action accrued.

The plaintiffs argue that this action is governed by the Uniform Commercial Code ("UCC") because the Passbooks for the CD accounts constitute "negotiable instruments" and thus, M.G.L.c. 106, § 3-118(e) is the governing statute of limitations. Under § 3-118(e), the six-year statute of limitations does not accrue upon the defendant's breach but rather after demand for payment is made to the maker. Accordingly, the plaintiffs argue, the 6-year period did not begin to run until demand for payment was made in October 2001. Fleet contends that the Passbooks are not negotiable instruments as defined under the UCC and thus the UCC statute of limitations is inapplicable.

Article 3 of the UCC applies only to "negotiable instruments." M.G.L.c. 106, § 3-102(a) (1998). The plaintiffs claim the Passbooks are negotiable instruments because they are certificates of deposit as defined in Article 3. However, "a certificate of deposit should be distinguished from a bank passbook, which is merely in the nature of a receipt ... of a deposit by the bank; while a passbook may be transferred ... *it is not a negotiable instrument,* either by itself ... nor can it be made so by contract." 10 Am.Jur.2d Banks §§ 347, 354 (emphasis added).

For the Passbooks to constitute certificates of deposit, they must meet the four requirements of negotiability. Both Chapter 765 of the Acts of 1957 and the 1998 amended version of the UCC defines certificate of deposit as an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. § 3-104(j). UCC § 3-104 provides the following requirements for an instrument to be negotiable: (1) it must be signed by the maker or drawer; (2) it must contain an unconditional promise or order to pay a sum certain in money to drawer except as authorized by Article 3; (3) it must be payable on demand or at a certain time; and (4) it must be payable to order or bearer. The Passbooks do not meet the fourth requirement because they do not contain the words payable to "the order of" or "to bearer." Further they do not contain an unconditional promise to pay because the additional language restricts their transferability.

***3** Moreover, many courts have determined that an instrument that meets all of these requirements may nevertheless be rendered nonnegotiable by the presence of additional language. Several courts have held certificates of deposit which were marked "not transferable" were not negotiable instruments. *Drabkin v. Capital Bank N.A.,* 156 BR 102 (Dist.Col.1993); *Amarillo Nat'l Bank v. Dilday,* 693 S.W.2d 38 (Tex.App.Amarillo 1985).

For Count I to be governed by the UCC, the Passbooks, if considered certificates of deposit, must first meet all four requirements of a negotiable instrument regardless of whether the 1957 or 1998 version applies. Further, under the 1998 amended version, even if the Passbooks satisfy the four requirements, the presence of the additional "Not Transferable" language contained therein renders the Passbooks nonnegotiable instruments. Under the current version of § 3-104(d), a promise or order other than a check is not an instrument, if it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable. On the first page of the Passbooks, there lies the phrase "NOT TRANSFERABLE" in capital letters. Additionally the terms and conditions of the contract located on the second page of the Passbooks state that "This Certificate and the deposit represented thereby are neither negotiable nor assignable except as collateral ...; Not transferable except on the records of this institution." The Passbooks are not negotiable instruments because the presence of both of these statements on the Passbooks constitute a conspicuous statement, to the effect that renders the promise or order non-negotiable as expressed in § 3-104(d).

The plaintiffs argue that the 1998 amended version does not apply to the CDs at issue because they were purchased several years prior to the enactment. However, even assuming the plaintiffs are correct, several courts have held the presence of

this additional nonnegotiable language rendered instruments, including certificates of deposit, nonnegotiable even prior to the codification of § 3-104(d) in the appropriate state UCC. *Estate of Isaacson,* 508 So.2d 1131 (Miss.1987) (Court concluded that the presence of language that they were "not transferable" or "non-negotiable" took the CDs outside the scope of Article 3, without even relying upon a provision such as § 3-104(d)); *Drabkin,* 156 BR 102 (Court held that a certificate of deposit which was clearly marked in two places as nonnegotiable and nontransferable was not negotiable even though it otherwise conformed with the requirements of UCC § 3-104). Assuming, *arguendo,* that the Passbooks constitute certificates of deposit and meet all of the requirements of negotiability, they are nonetheless rendered nonnegotiable by the presence of the additional language under both the Act of 1957 and 1998 amended version of Article 3. Consequently, Count I is not governed by § 3-118(e) of the UCC, and this action is governed by the statute of limitations for a breach of contract action.

***4** In the alternative, the plaintiffs argue that even if the UCC statute of limitations does not apply, there is a genuine issue of fact as to when the breach was capable of being discovered and the statutory period is triggered and whether a plaintiff knew or should have known of a cause of action to be decided by the trier of fact. *Tarygeta,* 436 Mass. at 229; *Campanella,* 351 Mass. at 185. In breach of contract cases, the statute of limitations may be tolled in a situation where the cause of action is not capable of being discovered by the injured party though the exercise of reasonable diligence. *Int'l Mobile Corp. v. Corroon & Black, Fairfield, & Ellis, Inc.,* 29 Mass.App.Ct. 215, 221-22 (1990); *Graveline v. BayBank Valley Trust Co.,* 19 Mass.App.Ct. 253-54 (1985) ("defects by their very nature could not have been discovered through the exercise of reasonable diligence").

It is undisputed that the Bovarnicks delivered to their accountant 1099 forms that they received from BankBoston with respect to the 1994 tax year, and that these forms indicated that the CD accounts at issue were closed in 1994. The plaintiffs claim that because they retained the Passbooks and that they do not monitor the dozens of 1099 forms they receive every year to confirm that each CD account still exists, they were not put on notice of the defendant's conduct that had allegedly caused them injury. See *Szymanski v. Boston Mutual Life Ins. Co.,* 56 Mass.App.Ct. 367, 369 (2002). Notice is predicated on the view of a reasonably prudent person in plaintiff's position. *Bowen v. Eli Lilly & Co.,* 408 Mass. 204, 210 (1990). A jury could not conclude that a reasonably prudent person in the plaintiffs' position bears the obligation, at a minimum, to read the 1099s issued to them each tax year to confirm that their CD accounts have not been wrongly closed. Accordingly, the statute of limitations was triggered in 1994 when the accounts were closed and such was indicated on the 1099 forms submitted to the Bovarnicks. The statute was not tolled by the plaintiffs' failure to conduct reasonable diligence and read the 1099 forms and Fleet is entitled to judgment as a matter of law because the claim is barred by the statute of limitations under M.G.L.c. 260, § 2.

Count II-Breach of Fiduciary Duty

The Bovarnicks allege that Fleet, as the institution holding their deposits, owed them a fiduciary duty which they subsequently breached by failing to redeem the deposits in 2001. It is established that the relationship between a bank and a depositor is a contractual, rather than a fiduciary one. *Govoni & Sons Construction v. Mechanics Bank,* 51 Mass.App.Ct. 35, n. 11 (2001). Accordingly, Fleet did not owe the Bovarnicks a fiduciary duty and cannot be found liable for a breach of any fiduciary duty and thus they are entitled to judgment as a matter of law.

Count III-Violation of Chapter 93A

In Count III, the plaintiffs allege that Fleet engaged in unfair or deceptive practice in the conduct of commerce in violation of M.G .L.c. 93A, § 2(a) because they failed to properly retain, document and account for the certificates of deposit, reasonably and appropriately investigate the Bovarnicks' claims, offer an explanation of the location of the said deposits, or report the certificates missing or abandoned to the proper regulatory agencies.

***5** The Supreme Judicial Court has found unfair business practices within the meaning of 93A, in addition to being "immoral, unethical, oppressive or unscrupulous," they must fall "within ... the penumbra of some common-law statutory, or other established concept of unfairness." *Siebold Hann Pub. Group, Inc. v. Lessem,* 53 Mass.App.Ct. 1106 (2001), citing *Linkage Corp. v. Trustees of Boston Univ.,* 425 Mass. 1, 27 (1997).

During the January 28, 2004, hearing for Fleet's Motion for Summary Judgment, this court determined the burden placed on Fleet to retain documents over several years is substantial.

Consequently, this court refused to draw a negative inference from Fleet's failure to locate the sought-after cashier checks that were destroyed in accordance with the bank's seven-year retention policy. While it is true that Fleet was able to locate spreadsheets concerning these certificates of deposit despite this seven-year retention policy, this does not lead to the conclusion that Fleet was engaged in deceptive practice and purposely destroyed or failed to locate the checks. Conversely, the fact that Fleet was able to locate documents that, in accordance with its retention policy, should have already been destroyed supports the finding that Fleet did not shirk their investigative and reporting duties regarding the Bovarnicks' claims. Fleet is entitled to judgment as a matter of law for Count III because there is no evidence that Fleet engaged in any immoral, unethical or unscrupulous or otherwise unfair or deceptive practice within the meaning of 93A.

ORDER

For the foregoing reasons it is hereby *ORDERED* that the Defendant's Motion for Summary Judgment on Counts I, II and II is *ALLOWED*.

All Citations

Not Reported in N.E.2d, 18 Mass.L.Rptr. 504, 2004 WL 2915736, 55 UCC Rep.Serv.2d 491

78 Mass.App.Ct. 1117
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Jean EASTMAN
v.
MASSACHUSETTS MOTOR
TRANSPORT ASSOCIATION & others. [1]

No. 09–P–1958.
|
December 30, 2010.

By the Court (GRASSO, BROWN & MEADE, JJ.).

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** The plaintiff, Jean Eastman, argues that (1) Massachusetts Motor Transport Association (MMTA) breached the contract with her husband (decedent) to provide life insurance. She makes the corollary argument that if the insurance policy had issued in accordance with the contract, she, not the decedent's children, is the intended third-party beneficiary. A Superior Court judge concluded that the plaintiff's action was barred by statute of limitations, G.L. c. 260, § 2, and allowed the defendants' motion for summary judgment.

It is undisputed that on approximately September 1, 1999, the decedent began working for the MMTA pursuant to a written employment offer which included a $100,000 life insurance policy at no cost to him. [2] Between October and December of 1999, the plaintiff contacted the MMTA concerning the status of the decedent's benefits. It was then that she discovered that the MMTA had not procured the insurance and that the decedent would have to apply for it. The decedent then applied on December 10, 1999, and learned in February or early March of 2000 that the insurance company denied his application because of his history of heart problems. The MMTA was ultimately unsuccessful in procuring insurance and on May l3, 2000, the decedent died without coverage. When the plaintiff inquired about the $100,000 after the decedent's death, Daniel Sullivan told her that he did not know how the benefit would be provided. The MMTA later gave the plaintiff $10,000 in an effort "to help her out ." Then, on May 12, 2006, one day before the sixth anniversary of the decedent's death, the plaintiff filed an action for breach of contract.

1. *Summary judgment.* "A cause of action for breach of contract accrues at the time of the breach." *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.,* 29 Mass.App.Ct. 215, 221 (1990). See *DiGregorio v. Commonwealth,* 10 Mass.App.Ct. 861, 862 (1980). Actions for breach of contract must be commenced within six years of when the cause of action accrues. G.L. c. 260, § 2. "The statute of limitations starts to run when an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury." *Bowen v. Eli Lilly & Co.,* 408 Mass. 204, 207 (1990). "This rule applies even though a specific amount of damages is unascertainable at the time of the breach or even if damages may not be sustained until a later time." *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc., supra.*

The plaintiff argues that the breach did not occur until the decedent's death on May 13, 2000, and therefore she filed her action with one day of the statutory allowance remaining. To survive the defendants' motion for summary judgment, the plaintiff must show that whether she knew or should have known of her possible claim before the decedent's death is a genuine issue of material fact. See *Riley v. Presnell,* 409 Mass. 239, 247 (1991). The plaintiff acknowledges, however, that she learned the MMTA had not procured insurance sometime between October and December of 1999 and that she received a letter notifying her that the insurance company rejected the decedent's application in February or early March of 2000. Therefore, summary judgment was appropriate because the plaintiff admittedly was on notice by March of 2000 at the latest that, contrary to the decedent's expectation, the MMTA had not procured insurance. See *Bowen v. Eli Lilly & Co.,* 408 Mass. at 207; *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc., supra* at 222–223 (holding that plaintiff learned of breach upon receiving insurer's letter disclaiming coverage).

***2** The discovery rule is inapposite here. See *International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.,* 29 Mass.App.Ct. at 221–222. The discovery rule applies only to certain hard-to-discern claims, e.g., where a defendant hinders the plaintiff's discovery of the cause of the injury or the cause of action is "inherently unknowable." *Patsos v. First Albany Corp.,* 433 Mass. 323, 328 (2001). The plaintiff

should have known she had a possible cause of action prior to the decedent's death because she knew the MMTA had not procured insurance, and she has not alleged the defendants hindered her discovery of that fact.

The plaintiff also argues that her reliance on the defendants' assurances and ongoing attempts to procure insurance equitably estops them from raising the statute of limitations defense. However, "[e]quitable estoppel will not apply if a reasonable time remains within the limitations period for filing the action once the circumstances inducing the delay have ceased" (citation omitted). *Pagliarini v. Iannaco,* 440 Mass. 1032, 1032 (2003) (noting limitations defense waived where defendant did not lull plaintiff throughout entire limitations period). Although the plaintiff argues that she reasonably relied on the defendants' assurances, nearly all six years of the statutory allowance still remained after the decedent died and such assurances ceased. Thus, because a reasonable time remained during the limitations period —nearly six years—equitable estoppel does not apply. The judge did not err.

2. *Breach.* The plaintiff next argues that as matter of law the MMTA breached a contract to provide the decedent with a $100,000 life insurance benefit. As the claim for breach of contract is barred by the statute of limitations, this issue need not be considered. See *Angoff v. Angoff,* 1 Mass.App.Ct. 112, 115 (1973) (noting that "if moot, speculative or subsidiary questions are reported they [should] not be considered" [citation omitted]).

3. *Intended beneficiary.* Finally, the plaintiff argues that she, not the decedent's children, is the intended third-party beneficiary of the agreement between the MMTA and the decedent. For reasons similar to those relative to the question of breach of contract, likewise this issue need not be considered. See *ibid.*

Judgment affirmed.

All Citations

78 Mass.App.Ct. 1117, 939 N.E.2d 135 (Table), 2010 WL 5464834

Footnotes

1 Asset Leasing Group, Inc., Daniel Sullivan, Peter C. Eastman, and Lynn E. Campbell.

2 The policy was to be paid for by either People Labor Leasing or Asset Leasing Group-companies owned by Daniel Sullivan, an MMTA board member.

CERTIFICATE OF COMPLIANCE PURSUANT TO MASS. R. APP. P. 16(K)

I, Brian T. Kelly, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs Mass, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, 10.5 characters per inch, and contains 32, total non-excluded pages.

/s/ Brian T. Kelly
Brian T. Kelly

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2020-P-0865

SUBURBAN HOME HEALTH CARE INC.
Plaintiff-Appellant

v.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES, OFFICE OF MEDICAID
Defendant-Appellee

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(d), I hereby certify that on this 28th day of September, 2020, on behalf of Appellant Suburban Home Health Care, Inc., a true and correct copy of the Brief of Appellant Suburban Home Health Care, Inc. and the Record Appendix were served via e-mail on the following:

Sharon Boyle
Michael A. Capuano
sharon.c.boyle@state.ma.us
michael.capuano@state.ma.us
Executive Office of Health and Human Services
One Ashburton Place, 11th Floor
Boston, MA 02108

/s/ Lauren A. Maynard
Lauren A. Maynard (BBO# 698742)
Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109
Tel: (617) 345-1000
Fax: (617) 345-1300
lmaynard@nixonpeabody.com